RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES

V.

OMAR AHMED KHADR

ALSO KNOWN AS:

AKHBAR FARHAD
AKHBAR FARNAD

NO. 050008

VOLUME ___ OF ___ TOTAL VOLUMES

3RD VOLUME OF REVIEW EXHIBITS (RE):
REs 65-110
APRIL 5, 2006 SESSIONS
(REDACTED VERSION)

United States v. Omar Ahmed Khadr, NO. 050008

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME NUMBER	SUBSTANCE OF CONTENTS
ALLIED PAPERS Not part of "record of trial"	
I*	Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications)
II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority

* Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Omar Ahmed Khadr, NO. 050008

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Record of Trial

† Interim volume numbers. Final numbers to be added when trial is completed.

UNITED STATES V. OMAR AHMED KHADR,
NO. 050008—3RD VOLUME OF REVIEW EXHIBITS

Description of Exhibit **PAGE No.**

3RD VOLUME OF REVIEW EXHIBITS: REs 65-110
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UNITED STATES V. OMAR AHMED KHADR,
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UNITED STATES V. OMAR AHMED KHADR,
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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Protective Order # 3
Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings

13 January 2006

1. **Generally:** The following Order is issued to provide general guidance regarding the below-described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. **Scope:** This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. **Definition of Prosecution and Defense:** For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. **Effective Dates and Classified Information**: This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. UNCLASSIFIED SENSITIVE MATERIALS:

a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless

classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

6. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:

(1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

(2) Does not cover public discourses of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. REQUEST FOR EXCEPTIONS: Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. BREACH: Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

R. S. Chester
Colonel, U.S. Marine Corps
Presiding Officer

UNITED STATES OF AMERICA	**PO 1 I (India)**
v.	Schedule of Motion Practice and Other trial Events
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**19 January 2006**

1. Counsel are reminded of the trial schedule established during the January 2006 term of the Commission. That schedule is (all dates 2006):

a. 24 February: Legal (non-evidentiary) motions due.

b. 10 March: Responses to legal motions due.

c. 17 March: Replies to legal motions due.

d. 27 March: Hearing at Guantanamo to hear legal motions.

e. 14 April: Evidentiary motions due.

f. 28 April: Responses to evidentiary motions due.

g. 5 May: Replies to evidentiary motions due.

h. 22 May: Hearing at Guantanamo to hear evidentiary motions.

2. The Presiding Officer relieves the parties of the requirement to file a notice of motions (See paragraph 7, POM 4-3) if the parties adhere to the schedule in paragraph 1 above. If a party requests an extension to file a motion, the Presiding Officer hereby requires a notice of motion be filed.

3. Discovery (PO 2).

a. The Presiding Officer believes it imperative to begin the discovery process and recognizes he modified the date to file objections to discovery. The modification was made prior to scheduling the 27 February-3 March Commission Term. In view of the need to begin and complete discovery and the 27 February – 3 March Commission Term, a modification of the trial schedule is warranted. Accordingly, all terms of the Discovery Order in PO 2 remain in effect. Paragraph 7 b of that Order provided: "Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006." This provision applies to both the Prosecution and the Defense.

b. Unless the Prosecution files an appropriate motion by 31 Jan 2006 and receives a stay from the Presiding Officer on its discovery obligations (See paragraph 14 of PO 2, "The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006,") the Prosecution shall comply with its Discovery Order obligations on the date required.

c. Unless the Defense files an appropriate motion by 31 Jan 2006 and receives a stay from the Presiding Officer on its discovery obligations (See paragraph 15 of PO 2, "The Defense shall provide to the detailed [sic] Prosecution the items listed below not later than 28 Feb 2006,") the Defense shall comply with its Discovery Order obligations on the date required.

d. If a party cannot comply with the requirement to file a motion to the Discovery Order as described above, they must request leave of the Presiding Officer to file their motion at a later date specifying why they cannot comply.

4. There will be a term of the Commission at Guantanamo the week of 27 February 2006. A session or sessions will be conducted in US v. Khadr to do the following:

a. Hear any motions pertaining to the Discovery Order.

b. Voir dire of the Presiding Officer.

c. Resolve issues with regard to Defense Counsel and to have new counsel make an appearance.

d. Other matters raised by the parties. In this regard, the parties are reminded of their obligations under POM # 4-3 to file written motions and serve them *electronically*. Any motion a party wishes litigated at the February trial term (other than one addressing the Discovery Order) shall be filed not later than 6 February 2006. Responses and replies shall follow in accordance with POM 4-3.

4. A summary of significant dates of the Commission is enclosed.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

Summary of PO 1 G Requirements

(If a conflict between this summary and the text of the Order, the text of the Order shall control.)

Item	When (2006)	What	Note
1	31 Jan	Government compliance with Discovery due	Unless the Prosecution applies for and is granted a stay because they filed a motion on the Discovery Order (Item 2)
2	31 Jan	Motions by either side pertaining to the Discovery Order due	
3	6 Feb	File motions a party wishes litigated at the Feb trial term	Other than motions in item 2.
4	24 Feb	Legal motions due	
5	27 Feb – 3 Mar	Term of the Commission – Guantanamo	See para 3 above for matters to be addressed. Specific session dates and times to be announced.
6	28 Feb	Defense compliance with Discovery Order	Unless the Defense applies for and is granted a stay because they filed a motion on the Discovery Order (Item 2)
7	10 Mar	Responses to legal motions due	
8	17 Mar	Replies to legal motions due	
9	27 Mar	Hearing at Guantanamo to hear legal motions	
10	14 Apr	Evidentiary motions due.	
11	28 Apr	Responses to evidentiary motions due	
12	5 May	Replies to evidentiary motions due	
13	22 May	Hearing at Guantanamo to hear evidentiary motions	

Hodges, Keith

From: Hodges, Keith
Sent: Friday, January 20, 2006 9:53 AM
To: [redacted]
Cc: Vokey LtCol Colby C
Subject: RE: PO 1 I - Khadr - Trial Schedule
Attachments: PO 1 I - Khadr - Trial Schedule _19 Jan 2006_.pdf; PO 1 - Khadr - Scheduling of first session 2 Dec 05.pdf; PO 1 A - Khadr - Reminder to respond to PO 1, 7 Dec 05.pdf; PO 1 B - Khadr - CPT Merriam's Response and POs reply, 8 Dec.pdf; PO 1 C - Khadr - Prof Wilson's Response, 8 Dec.pdf; PO 1 D - Khadr - Prof Ahmad's Response, 8 Dec.pdf; PO 1 E - Khadr - Prof Ahmad's email for clarification and PO response, 9 Dec.pdf; PO 1 F - Khadr - Announcement of specific Jan 06 session times, 9 Dec 05.pdf; PO 1 F - Khadr - Excusing counsel from attendance at GTMO 16 Dec 05.pdf; PO 1 G - Khadr - POs Voir Dire bio summary, 9 Dec.pdf; PO 1 H - Khadr - Excusing Counsel from sessions at GTMO.pdf; PO 2 - Khadr - Discovery Order - 19 Dec 05.pdf; PO 3 - Khadr - Voir Dire questionaire for the PO.pdf; Email of 19 Jan announcing Feb 2006 trial term.pdf; Protective Order 3 (13 Jan 06) US v Khadr.pdf; Protective Order 1 (11 Jan 06) US v Khadr.pdf; Protective Order 2 (11 Jan 06) US v Khadr.pdf

LTC Vokey,

Welcome aboard.

Please respond so that I know I have your email address correct. Please also provide your phone number, DSN and commercial.

For your convenience, I have attached all the current PO (Presiding Officer) filings in your case as well as the Protective Orders. I will leave it up to your co-counsel to send the D (Defense) filings. All the motions made by the defense thus far have been ruled upon. If you provide your mailing address, I will also send you a CD with all the current Review (appellate) Exhibits which includes all filings plus other matters.

I have also attached an email sent to counsel yesterday announcing the 27 Feb trial term. I am confident that the Presiding Officer will want to hold a session in US v Khadr then, and he will confirm that later.

The Presiding Officer Memoranda (POMs - Rules of Court) can be found at http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html May I suggest that POM 4-3 might go to the top of your reading list.

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

Fax: [redacted]

From: Hodges, Keith [redacted]
Sent: Friday, January 20, 2006 9:28 AM
To: Sullivan, Dwight, COL, DoD OGC; Hodges, Keith; [redacted]
Cc: Vokey LtCol Colby C
Subject: RE: PO 1 I - Khadr - Trial Schedule

Thank you.

Now for the important part: do you have his current email address?

Keith Hodges

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Friday, January 20, 2006 9:21 AM
To: [redacted]
Cc: 'Vokey LtCol Colby C'
Subject: RE: PO 1 I - Khadr - Trial Schedule

I was just handed a letter from the Judge Advocate General of the Navy approving the request to make LtCol Vokey available as a selected detailed defense counsel in the case of United States v. Khadr. I will prepare and distribute a detailing letter today and distribute a scanned copy of RADM McPherson's letter.

Respectfully submitted,
Dwight Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]
Arlington, VA 22202
[redacted]

Hodges, Keith

From: Merriam, John J CPT (PKI)[redacted]
Sent: Friday, January 20, 2006 4:53 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

Sir:

1. As directed, I hereby affirm that I have received your email.

2. I saw Col. Sullivan's email regarding Lt.Col. Vokey being detailed to the case today. He will be the "lead defense counsel" in this case. At this time, I remain detailed to the case as the ADC, though it is possible that will change. I will notify you if it does.

3. I am leaving tonight for 2 weeks OCONUS. While I will try to access my email if possible, I will be in the Rep. of Panama and I just do not know if I will be able to do so. I know that the POMs adjust the presumed date of my "receipt" of message traffic to account for OCONUS time. Since Lt.Col. Vokey is on the case, I presume this will not be an issue; however, from time to time you have required responses from all defense counsel, so I wanted you to have this information ASAP.

4. Due to the length of my trip, I will not turn on my "out of office" message -- with the sheer volume of email traffic in commissions cases, I can imagine that would be incredibly annoying for all of you. Instead, unless you prefer otherwise, this email is intended to serve as that notice.

5. I am working through some issues with respect to the newly scheduled late-FEB term.

a. As you recall, one of the things we did in JAN at the direction of the PO was establish a calendar with the government. We did so, and (unless I and my colleagues are gravely mistaken) identified late MAR as the next time we would all be present at GTMO. As I believe you also know, I am not a full-time commissions counsel -- I have "regular" courts-martial cases as well. Upon my return, I made representations to the government, the Chief Military Judge, and the Regional Defense counsel, to the effect that I would be available to try my cases here at Fort Lewis between now and late MAR, as well as to attend off-site training on a TDY basis. I have submitted several docketing requests requesting trial dates in late FEB and early MAR, and I expect the Military Judge to respond to those requests very soon.

b. I will be consulting with my fellow defense counsel today to determine their availability, and I imagine that a response will be forthcoming from the Khadr defense team that identifies all of our issues with respect to this newly scheduled session. I offer the information above in order to provide you maximum notice of potential problems. Again, the new session surprised me and I am trying to find a way to resolve conflicts, but I find myself in the uncomfortable position of now trying to back out of "firm commitments" that I made earlier this week to my boss, my government colleagues, my military judges, my family, etc.

Respectfully,

John J. Merriam
CPT, JA
Trial Defense Counsel

From: Hodges, Keith [redacted]
Sent: Thursday, January 19, 2006 9:14 AM
To: [redacted]

CAPT OJAG; [redacted]
Subject: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

This email is to provide long-range planning guidance to all counsel in the following cases:

United States v al Bahlul
United States v Khadr
United States v al Qahtani
United States v Barhoumi
United States v al Sharbi
United States v Muhammad

All counsel on all the above cases are to respond to the Assistant that you received this email. Defense, please also pay special attention to paragraph 6

below.

1. The Commission will hold a trial/session term the week of 27 February 2006 at Guantanamo Bay Naval Station, Cuba. Counsel in the above named cases must be prepared to conduct any and all business before the Commission that can be conducted at that time. The individual Presiding Officers, through the Assistant, will work with counsel to determine the exact business to be addressed. Collectively, the Presiding Officers will set the exact schedule and publish it at a later date.

2. The Office of the Presiding Officers is advised that there are no Muslim Holy days during the above period. If addressees have different information, please advise soonest.

3. The first session of the Commission may be held as early as 1300, 27 February 2006. The last session may be held as late as COB Friday, 3 March 2006.

4. The Presiding Officers request that counsel for those cases that will not be in session at GTMO during this term still be present at GTMO so that the parties and the PO can work together to discuss issues and make plans. For example, at the last term, the parties were able to discuss and agree on the wording of Protective Orders. The Presiding Officers are aware of the limitations on conferences and discussions versus what must be resolved in a session. All counsel should obtain the appropriate country clearances and make other necessary logistical arrangements.

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

BY DIRECTION OF THE PRESIDING OFFICERS
Keith Hodges
Assistant to the Presiding Officers
Military Commission

[redacted]

<<Referred Commission Cases - 18 Jan 06 v2.doc>>

Hodges, Keith

From: Muneer Ahmad [redacted]
Sent: Monday, January 23, 2006 9:06 AM
To: [redacted]
Cc:

Subject: RE: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

Mr. Hodges:

1. This is to confirm receipt of your message.

2. I am unable to attend the newly scheduled commission session during the week of February 27. As Captain Merriam indicated in his response to your message, during the January session, defense counsel, the government, the Presiding Officer and yourself discussed and agreed to a schedule for the next sessions of the commission. We were informed that this was one of the reasons necessitating 8-5 sessions, which were held over the defense's objection. Since returning from the January session with the understanding that the next session would be at the end of March, I have made commitments in other cases that preclude my travel for this new session.

3. As I believe you know, Lt. Col. Vokey was detailed to Omar Khadr's case as of Friday, January 20, 2006. I do not know if he will be available for the newly scheduled session or not.

4. In light of my unavailability, the apparent unavailability of Captain Merriam, and the recency of Lt. Col. Vokey's detailing, I request that the business of the session now planned for February be put over to the session already scheduled for March.

Sincerely,

Muneer Ahmad

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]

From: Hodges, Keith [redacted]
Sent: Thursday, January 19, 2006 12:14 PM
To: [redacted]

Cc: [redacted]

Subject: Trial/Session Term of the Military Commission - 27 Feb - 3 Mar 2006

This email is to provide long-range planning guidance to all counsel in the following cases:

United States v al Bahlul
United States v Khadr
United States v al Qahtani
United States v Barhoumi
United States v al Sharbi
United States v Muhammad

All counsel on all the above cases are to respond to the Assistant that you received this email. Defense, please also pay special attention to paragraph 6 below.

1. The Commission will hold a trial/session term the week of 27 February 2006 at Guantanamo Bay Naval Station, Cuba. Counsel in the above named cases must be prepared to conduct any and all business before the Commission that can be conducted at that time. The individual Presiding Officers, through the Assistant, will work with counsel to determine the exact business to be addressed. Collectively, the Presiding Officers will set the exact schedule and publish it at a later date.

2. The Office of the Presiding Officers is advised that there are no Muslim Holy days during the above period. If addressees have different information, please advise soonest.

3. The first session of the Commission may be held as early as 1300, 27 February 2006. The last session may be held as late as COB Friday, 3 March 2006.

4. The Presiding Officers request that counsel for those cases that will not be in session at GTMO during this term still be present at GTMO so that the parties and the PO can work together to discuss issues and make plans. For example, at the last term, the parties were able to discuss and agree on the wording of Protective

Orders. The Presiding Officers are aware of the limitations on conferences and discussions versus what must be resolved in a session. All counsel should obtain the appropriate country clearances and make other necessary logistical arrangements.

5. If any counsel in the above listed cases cannot be at GTMO during the February trial/session term, advise the Assistant, and the Presiding Officer and opposing and other counsel on that case, **NLT 1200, EST (Monday) 23 January 2006** with the reasons for the unavailability.

6. All Defense counsel.

a. The fact that an attorney client relationship has not yet been established, or a client has indicated he wishes to proceed pro se, does not amount to "unavailability," and it may suggest a session in February is paramount. Counsel are encouraged to provide such information, however, as it might be useful in planning sessions.

b. Detailed Defense Counsel will advise if there are any other counsel (military or civilian) who are also detailed, or who may be detailed or may join the case in the future, and who are not on the attached list. If there are other such counsel, advise the Assistant, Presiding Officer, and other counsel on the case and provide email addresses and other contact information.

BY DIRECTION OF THE PRESIDING OFFICERS
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]
<<Referred Commission Cases - 18 Jan 06 v2.doc>>

UNITED STATES OF AMERICA	)	**PO 1 M**
	)	Schedule of Motion Practice and Other trial Events
v.	)	
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	**23 January 2006**

1. The Presiding Officer is in receipt of emails from CPT Merriam (PO 1 K) and Mr. Ahmad (PO 1 L) concerning the February trial term. (Both attached.) Those filings are being considered as a Defense request not to hold a session of the Commission in US v. Khadr during the February trial term. In light of those requests, this document rescinds and replaces PO 1 I (India) issued 19 Jan 2006.

2. Counsel are reminded of the trial schedule established during the January 2006 term of the Commission. That schedule is (all dates 2006) (*Note*: No change to this paragraph from PO 1 I except items d and h):

a. 24 February: Legal (non-evidentiary) motions due.

b. 10 March: Responses to legal motions due.

c. 17 March: Replies to legal motions due.

d. 27 March: Hearing at Guantanamo to hear legal motions. (See also paragraph 5 below.)

e. 14 April: Evidentiary motions due.

f. 28 April: Responses to evidentiary motions due.

g. 5 May: Replies to evidentiary motions due.

h. 22 May: Hearing at Guantanamo to hear evidentiary motions. (See also paragraph 5 below.)

3. (*Note*: No change.) The Presiding Officer relieves the parties of the requirement to file a notice of motions (See paragraph 7, POM 4-3) if the parties adhere to the schedule in paragraph 1 above. If a party requests an extension to file a motion, the Presiding Officer hereby requires a notice of motion be filed.

4. Discovery (PO 2).

a. The Presiding Officer believes it imperative to begin the discovery process and recognizes he modified the date to file objections to discovery. The modification was made prior to scheduling the 27 February-3 March Commission Term. In view of the need to begin and complete discovery as soon as possible, all terms of the Discovery Order in PO 2 remain in effect. Paragraph 7 b of that Order provided: "Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006." This provision applies to both the Prosecution and the Defense.

b. Unless the Prosecution files an appropriate motion by 31 Jan 2006 and receives a stay from the Presiding Officer on its discovery obligations (See paragraph 14 of PO 2, "The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006,") the Prosecution shall comply with its Discovery Order obligations on the date required

c. Unless the Defense files an appropriate motion by 31 Jan 2006 and receives a stay from the Presiding Officer on its discovery obligations (See paragraph 15 of PO 2, "The Defense shall provide to the detailed [sic] Prosecution the items listed below not later than 28 Feb 2006,") the Defense shall comply with its Discovery Order obligations on the date required.

d. If either party makes a motion concerning this Order, the parties will continue to fulfill discovery obligations pending disposition of the motion, unless the motion also requests, and the Presiding Officer grants, a delay from compliance. Any request for a delay will particularly describe the items by paragraph number as listed in this Order for which a delay is requested. A request for a delay that accompanies a motion concerning this Order for items not affected by the motion will not ordinarily be granted.

e. If a party cannot comply with the requirement to file a motion to the Discovery Order as described above, they must request leave of the Presiding Officer to file their motion at a later date specifying why they cannot comply.

5. The next scheduled term of the Commission will be on or about 27 March. This date – and other scheduled dates of the Commission - may be adjusted depending on other sessions and the parties are expected to remain flexible.

6. A summary of significant dates of the Commission is enclosed.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

Summary of PO 1 M Requirements

(If a conflict between this summary and the text of the Order, the text of the Order shall control.)

Item	When (2006)	What	Note
1	31 Jan	Government compliance with Discovery due	Unless the Prosecution applies for and is granted a stay because they filed a motion on the Discovery Order (Item 2)
2	31 Jan	Motions by either side pertaining to the Discovery Order due	
3	24 Feb	Legal motions due	
4	28 Feb	Defense compliance with Discovery Order	Unless the Defense applies for and is granted a stay because they filed a motion on the Discovery Order (Item 2)
5	10 Mar	Responses to legal motions due	
6	17 Mar	Replies to legal motions due	
7	27 Mar	Hearing at Guantanamo to hear legal motions	This date may be adjusted. parties to remain flexible.
8	14 Apr	Evidentiary motions due.	
9	28 Apr	Responses to evidentiary motions due	
10	5 May	Replies to evidentiary motions due	
11	22 May	Hearing at Guantanamo to hear evidentiary motions	This date may be adjusted. parties to remain flexible.

Hodges, Keith

From: Hodges, Keith
Sent: Thursday, January 26, 2006 8:50 PM
To: [redacted]
Cc: R. S. Chester
Subject: PO 1 N - US v Khadr - Trial Dates
Attachments: RE 54 - Khadr.pdf; RE 36 - Khadr.pdf

The Presiding Officer has directed me to provide the below reply.

1. Thank you for your reply.

2. LtCol Vokey was not at GTMO when there was a discussion on the record concerning how the accused was to be addressed. This discussion began with the defense's memorandum of an 8-5 session which referred to the accused by only his first name, Omar. That memorandum is at RE 54 (attached.) Notwithstanding how that memorandum reads, neither the Assistant nor the Presiding Officer ever referred to the accused as "Omar." In addition, CPT Merriam filed a motion (RE 36, attached) suggesting it was more appropriate to refer to the accused as Omar after the Assistant referred to the accused as "Mr. Khadr" during email exchanges. While it appears that Mr. Khadr was a young man at the time of the alleged offenses, he is an adult now. More importantly, the Presiding Officer directed the parties to this Commission accord the accused the respect due him by referring to him during sessions of the Commission or in filings as "the accused" or "Mr. Khadr." This does not mean, of course, that the accused's age at the time of the alleged offenses is not relevant, and the parties may deal with that matter as needed at trial.

3. It is reasonable that LtCol Vokey have some time to get acquainted with Mr. Khadr and meet with co-counsel to plan the defense. The Presiding Officer believes that a better time for someone to have first raised this matter is when Professor Ahmad wrote PO 1 L and CPT Merriam PO 1 K. (These filings are attached.) While it is noted that LtCol Vokey was not an addressee on PO 1 L, he was on PO 1 K. It was that exchange of emails that caused PO 1 M.

4. In any event, the Presiding Officer will give the Defense some time as requested, but expects to be advised of the Defense's position on the calendar (enclosure to PO 1 M) as soon as it is known but in any event not later than 13 February 2006. Further, there is no reason why at least some motions cannot be raised as soon as they are known as POM 4-3 directs.

5. As the enclosure to PO 1 M indicates, the parties have a motion due on the Discovery Order by 31 Jan 06 if they desire to file one. Anticipating a request for an extension given LtCol Vokey's email of 25 January 2006, 2:10 PM, the Presiding Officer extends that motion due date to 9 February 2006. If further time is need, request an extension IAW POM 4-3. (See paragraph 13 of that POM.)

6. The Presiding Officer anticipates the 27 March session will go forward as scheduled, and that at that session, the parties will be prepared to:

a. Litigate any Discovery Order motions,

b. Litigate those law motions raised by the parties,

c. Conduct voir dire of the Presiding Officer,

d. Resolve any outstanding issues with respect to the accused's representation, and

e. Clarify the trial schedule to include setting a date for trial.

7. With regard to paragraph 6b above, the Presiding Officer is not directing that *all* law motions be litigated at the 27 Mar 06 session, but he does expect that those motions that address general jurisdictional issues be filed and litigated and relies upon counsel as officers of the court to make a good faith effort to do so. The parties can expect, however, that a session will be scheduled in April to resolve all outstanding law motions and should be discussing session dates with opposing counsel to try and arrive at a mutually agreeable date to recommend to the Presiding Officer.

8. Motions the parties desire to litigate at the March trial term will be served not later than 1 March in accordance with POM 4-3. The Presiding Officer reserves the option of requiring notice of motions as provided in POM 4-3 depending on the progress of the parties.

9. The Prosecution will fulfill its discovery obligations in accordance with PO 2.

10. This email and the below emails will be placed on the filings inventory as PO 1 N.

Attachments to this email:
1. RE 54
2. RE 36

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Vokey LtCol Colby C [redacted]
Sent: Wednesday, January 25, 2006 5:10 PM
To: [redacted]
Cc: R. S. Chester
Subject: RE: Confirming Trials dates and availability

Mr. Hodges,

I have reviewed the proposed trial schedule but cannot agree to it at this time. As you know, I just found out that I

was detailed this past Friday afternoon. I have not met my client or any of my co-counsel. I don't know how to contact my Army co-counsel while he is OCONUS. I haven't received any discovery, court rules, etc. Although I understand that many counsel and other personnel have been involved with this case and other business with the commissions for some time, this is all new to me. I have received about a hundred emails, many with attachments, since Friday. I am trying to review them all now. I am also not familiar with the court rules/law governing this case. I undertstand that most of these can be found on the commissions website. I will download everything I can find. This is all overwhelming right now and I am trying to get up to speed as quickly as possible.

I am not prepared to agree to any schedule at this point. I'm not even prepared to comment on the schedule or to file a motion for continuance (I am not even sure of the proper procedure to do so). I have contacted support personnel from OMC to schedule a trip to see my client as soon as possible. I plan on flying to DC next week, hopefully meet with commissions personnel, see some evidence, meet some of my co-counsel. I then will fly to GITMO on 4 February to meet with Omar. I am scheduled to return from GITMO on 8 or 9 February. After that point, I will be prepared to at least comment on the schedule or put in a motion for continuance.

V/R
LtCol Vokey

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Tuesday, January 24, 2006 13:26
To: [redacted]
Cc: R. S. Chester
Subject: Confirming Trials dates and availability

Counsel in US v. Khadr.
(If someone would forward this to CPT Merriam who I understand is OCONUS, I would appreciate it. He may have a web email account of which I am unaware)

1. The Presiding Officers are working to set the docket beyond the February trial term. In response to your email traffic, he issued PO 1 M (revised trial schedule) that puts litigation of law motions during the week of 27 March. The Presiding Officer fully expects to do the motions then as announced.

2. This email is to confirm whether any counsel see any reason why this is not a good date and we cannot proceed with those motions? There are other events to plan around, and before we cause any changes, we thought we would check with you. If the week before or after would be acceptable or better, please advise.

3. Please be sure to know the trial schedule is still as reflected in PO 1 M, and any change will be reflected in a filing. The purpose of this email is only to explore options.

FOR THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

[redacted]

Hodges, Keith

From: Hodges, Keith
Sent: Wednesday, January 25, 2006 2:01 PM
To: [redacted]
Cc:
Subject: Preserving objections, concerns and issues: POM 4-3 and POM 12-1

To all counsel in all Military Commission Cases

1. The Presiding Officers have asked me to point out some features of the POMs of which you might be unaware. The POMs are the Rules of Court for the Presiding Officers and they describe the manner in which parties communicate with the Presiding Officers.

2. A main feature of POM 4-3 is that if a counsel wants relief, the counsel must comply with that POM - which means to file a motion. A main feature of the filings inventory POM (12-1) is that the only issues before the Presiding Officer are those listed on the filings inventory in the appropriate section (D for defense and P for Prosecution.) Taken together, this means that motions filed by the parties that meet the formatting and other requirements of POM 4-3 are placed on the filings inventory in the appropriate section. This document is available to the parties, and all can see what matters are before the Presiding Officer to resolve. If counsel believes that s/he has a motion or other request for relief pending before the Presiding Officer and it is not on the filings inventory in the appropriate section, then counsel must take action to file; if counsel believes a motion has already been filed, work with me so we can find that filing and ensure it gets on the list. How you raise matters on the record - by which I mean during a session - with the Presiding Officer is outside the scope of this email. This email addresses only communications outside the record - by which I mean not during a session.

4. The PO (Presiding Officer) section of the filings inventory reflects only those significant matters that the Presiding Officer sends or elects to place there so that there is a record of them. An email from counsel, containing an objection or other request for relief, might find its way into the PO section. But, if the counsel wants that objection to be resolved by the Presiding Officer, counsel must file in accordance with POM 4-3. Only when that is done will the filing be placed on the filings inventory in the appropriate P or D section and the matter preserved.

5. I point out these features so that all may appreciate that an objection, concern, observation, or request for relief in the body of an email is not a motion under POM 4-3 and therefore will not be added to the filings inventory in the P or D section. So, as an example, suppose in an email a prosecution counsel said, "I object to X." That is not a motion IAW POM 4-3, and unless the Presiding Officer directed otherwise, it would be not added to the Prosecution section of the filings inventory. Since that objection is not in the Prosecution section of

the filings inventory, it is not before the Presiding Officer for resolution. Of course, the same analysis would hold true if the defense counsel said, "I object to X."

6. Finally, please appreciate the reason behind the inter-relationship between POM 4-3 and 12-1. The parties and the Presiding Officer deserve to know what matters are before the Presiding Officer. Notwithstanding all the advantages of email, its downside is that what one person views as a casual observation, discussion, or a prelude to a motion to be made could be viewed by another as having preserved a matter to go before the Commission and/or on appeal. The only way to ensure all know what is intended by an email, what matters they are expected to respond to or resolve, to ensure issues for the Presiding Officer to resolve are preserved, and to prevent inadvertent waiver is to have a system that lists such matters and is available to all.

7. A copy of this email will be placed in the filings inventory of all cases. A filings inventory in all cases that have not been stayed will be sent later this week.

BY DIRECTION OF THE PRESIDING OFFICERS

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

20 January 2006

MEMORANDUM DETAILING SELECTED DETAILED DEFENSE COUNSEL

To: Lieutenant Colonel Colby C. Vokey, USMC

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR

1. Pursuant to the authority granted to me by my appointment as Chief Defense Counsel; Sections 4.C and 5.D of Military Order No. 1, dated August 31, 2005, and Section 3.B(8) of Military Commission Instruction No. 4, dated September 16, 2005, you are hereby detailed as Selected Detailed Defense Counsel for all matters relating to Military Commission proceedings involving Omar Ahmed Khadr. Your appointment exists until such time as any findings and sentence become final as defined in Section 6.H(2) of Military Commission Order No. 1, unless you are excused from representing Mr. Khadr by a competent authority.

2. In your representation of Mr. Khadr, you are directed to review and comply with the President's Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (Nov. 16, 2001), Military Commission Orders Nos. 1 and 3, Military Commission Instructions 1 through 9, and all Supplementary Regulations and Instructions issued in accordance therewith. You are directed to ensure that your conduct and activities are consistent with all applicable prescriptions and proscriptions.

3. You are directed to inform Mr. Khadr of his rights before a Military Commission. In the event of any change in Mr. Khadr's exercise of his right to Civilian Defense Counsel at his own expense, you shall inform me as soon as possible. Please also notify me whether Mr. Khadr requests that his detailed defense counsel, CPT John J. Merriam, JA, USA, continue to assist in his representation as an additional defense counsel. *See* Section 4(C)(3)(a) of reference (a) [Military Commission Order No. 1, § 4(C)(3)(a) (31 Aug 05); Military Commission Instruction No. 4, ¶ 3.E(4) (16 Sep 05).

4. In the event that you become aware of a conflict of interest arising from the representation of Mr. Khadr before a Military Commission, you shall immediately inform me of the nature and facts concerning such conflict. You should be aware that in addition to your State Bar and Service Rules of Professional Conduct, that by virtue of your appointment to represent Mr. Khadr before a military commission, you will be subject to professional supervision by the Department of Defense General Counsel.

5. You are directed to inform me of all requirements for personnel, office space, equipment, and supplies necessary for preparation of the defense of Mr. Khadr.

Subj: DETAILING LETTER REGARDING MILITARY COMMISSION PROCEEDINGS OF OMAR AHMED KHADR

Dwight H. Sullivan
Colonel, United States Marine Corps Reserve

cc:
Colonel Morris Davis, USAF
Brigadier General Thomas L. Hemingway, USAF
Mr [redacted]

UNITED STATES OF AMERICA	**DEFENSE**
v.	Motion for a Continuance in Military Commissions Proceedings
OMAR AHMED KHADR	**14 February 2006**

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr*.

2. **Relief Requested**. The defense requests that a continuance be granted in the Military Commission proceedings currently pending against Omar Ahmed Khadr. The defense also requests a modification to the Schedule of Motion Practice and Other Trial Events (PO 1 I) to reflect the following dates:

28 April:	Legal (non-evidentiary) motions due
12 May:	Responses to legal motions due
23 May:	Replies to legal motions due
29 May:	Hearing at Guantanamo to hear legal motions, conduct voir dire of PO
30 June:	Evidentiary motions due
14 July:	Responses to evidentiary motions due
21 July:	Replies to evidentiary motions due
31 July:	Hearing at Guantanamo to hear evidentiary motions

Consistent with the continuance, the defense also requests modification to timelines identified in other orders of this Commission, including, but not limited to, the Discovery Order issued by the Presiding Officer on 19 December 2005.

3. **Synopsis.** PO 1 I sets out the Schedule of Motions as promulgated on 19 January 2006, which includes the next hearing to be conducted on 27 March 2006. Due to defense counsels' existing schedules, lack of knowledge of the facts and law, and requirement to investigate facts, interview witnesses and develop a defense, the current schedule must be modified. A continuance is necessary in order for the accused to receive a full and fair hearing.

4. Burdens **of Proof and Persuasion.** The burden of proof is on the moving party to show, by a preponderance of the evidence, that a continuance is necessary in the interests of justice. However, when the moving party is the accused, "the judge should err on the side of liberalism in taking action on a delay request when good cause for a delay exists." *United States v. Andrews*, 36 M.J. 922, 925-26 (A.F.C.M.R. 1993).

5. **Facts.** On Friday 20 January 2006, Lieutenant Colonel (LtCol) C.C. Vokey was made available and detailed to represent Omar Khadr as lead counsel in the military commissions case of the United States of America v. Omar Ahmed Khadr. LtCol Vokey immediately made arrangements to travel to Guantanamo Bay, Cuba to meet his client at the earliest opportunity. After receiving the appropriate clearances and fiscal data for orders, LtCol Vokey traveled to Washington D.C. on 31 January 2006 to meet with

civilian co-counsel Muneer Ahmad and Rick Wilson and to coordinate with the Office of Military Commissions (OMC) for the travel to Cuba. A few days later, on 4 February, LtCol Vokey arrived at Guantanamo Bay. Unfortunately, he was only able to meet with his client for just over two hours on 7 February.

On 8 February, he traveled back to Washington DC and OMC. LtCol Vokey received the first discovery of the case on 10 February and traveled home to California on the same day. It should be noted, though, that the prosecutor, Maj [redacted] did serve the above discovery on the defense just before 31 January in accordance with published schedules. However, the discovery served was in the form of CD-ROMs and only one copy was provided. As there was no capability to burn copies of CD-ROMs in the Defense Office at OMC, the Defense Office immediately sent the discovery to another office for copying for all counsel. The copies were completed and returned to OMC (Defense) on 10 February.

At present, LtCol Vokey and two of the three other counsels have the initial discovery in their possession. However, none have had the opportunity to review it yet. It is anticipated that it will take at least several weeks to review all of the volumes of discovery provided so far. As a result, the Defense is not ready to file any motions (law or fact), is unable to make discovery or witness requests, and has not been able to develop even basic ideas as to how to defend the case at trial.

There are also several schedule conflicts between the trial schedule established in PO 1 I and the schedules of LtCol Vokey and co-counsel. Before listing those conflicts, it should be noted that none of the counsel for Omar Khadr are assigned to OMC full-time. LtCol Vokey serves as the Marine Corps' Regional Defense Counsel for the

Western Region of the United States. As such, he represents individual clients, supervises and advises over 20 Defense Counsel, and is responsible for various training events. As he was only detailed to the case at bar on 20 January, there were other cases and obligations already scheduled prior to that detailing. The following are the other known commitments for LtCol Vokey:

23 February-11 March	Travel to Japan and Hawaii to serve as a training instructor.
15-17 March	Case at 29 Palms, CA
29-31 March	Case at Edwards AFB, CA
10-12 April	Training event at Camp Pendleton, CA
14-19 May	Hosting trial advocacy training in San Diego, CA

Co-counsel Muneer Ahmad and Rick Wilson are both professors of law at American University School of Law in Washington D.C. (Professor Wilson will be entering his appearance for the commissions case in the very near future). Accordingly, they both have responsibilities associated with teaching law classes, supervising students for legal clinics and cases, and various other responsibilities associated with their academic positions, such as committees and school programs. Additionally, both have speaking or travel commitments that have been previously scheduled, to include: 10-11 February in Boston, MA; 17-19 Feb conference in Seattle, WA; 13-17 March; 21-25 March conference in Madrid, Spain; 1-5 May Clinical Teachers Conference in Washington D.C. In order for Professors Ahmad and Wilson to participate in further proceedings, it is necessary to delay any hearings until after the end of law school

semester (24 April) and graduation (21 May). The period of 24 April – 21 May is also particularly difficult as that is the time when exams and papers are graded and 70-90 active clinic cases must be transferred from the departing students.

Finally, Detailed Counsel, Captain John Merriam, U.S. Army, serves as a full-time Defense Counsel at Fort Lewis, Washington (state) and represents various soldiers in courts-martial and administrative hearings. Currently, Captain Merriam has a full trial schedule through the first week of April.

A continuance of the case is necessary to ensure that LtCol Vokey and co-counsel are free to appear at the hearings. In addition to counsel schedules, the defense intends on conducting their own investigation and discovery by traveling to several foreign countries, to include Canada, Afghanistan and Pakistan. Such travel is necessary in order to develop defenses, gather evidence for the merits and sentencing, view the scenes of the alleged crimes, and identify and locate potential witnesses. The Defense anticipates traveling during April and June for these fact-finding missions. Finally, the Defense, particularly LtCol Vokey, needs further time to discuss the case with his client. Given the difficulties in traveling to Guantanamo Bay and coordinating a meeting with Omar Khadr and given that LtCol Vokey was only permitted a little over two hours to talk with Mr. Khadr so far, a great deal more time over repeated visits will be required to adequately discuss the case.

Finally, detailed counsel in the case need formal training in the area of international law and law of war, especially in preparation of legal and evidentiary motions. The Defense desires to attend a service school that provides such formal

instruction, such as the course recently attended by the Presiding Officer at the The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

6. **Argument.** The President's Military Order of 13 November 2001 ("PMO") requires that persons who are tried before a military commission be given "a full and fair trial, with the military commission sitting as triers of both fact and law." PMO, at § 4(c)(2). In order for Omar Khadr to receive a full and fair trial, the Defense needs sufficient time to become educated as to the facts and law and to investigate, interview witnesses, and develop a defense to the charges.

The government will not suffer harm from a delay. Oar Khadr has been in the custody of the United States for over three and a half years – an extraordinarily long time for the government to perfect its case. The defense has been in possession of the initial delivery of discovery for a few days. The defense respectfully suggests that the Commission should view skeptically any assertion by the government that it has a compelling interest in opposing a continuance of this length.

7. **Oral Argument** is not requested.

8. **Witnesses and Evidence**. None.

9. **Reservation**. In making this motion, the defense does not waive any objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to try him.

10. **Attachments**. None.

By: _____
COLBY C. VOKEY
LtCol, U.S. Marine Corps
Selected Detailed Defense Counsel

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Thursday, February 16, 2006 8:54 PM
To: [redacted]
Subject: D 5 A: US v Khadr, Direction for supplemental information and directions of the Presiding Officer

The Presiding Officer is in receipt of D-5, the defense's motion for a continuance and has directed the following:

1. Not later than 22 Feb 06, the Defense will supplement its D-5 motion with the following information:
a. Clarification of the number, amount of data, and approximate page count of the data CDs provided to the defense by the prosecutor.

b. The nature of the cases listed for 15-17 March and 29-31 March. (Court-martial or board, type case, most serious charge, anticipated forum, anticipated plea.)

c. The nature of the training scheduled for 10-12 April.
d. Clarify the obligations listed on page four of the motion indicating which attorney and explanation of the commitment.

e. Listing of CPT Merriam's schedule and clarification as to whether he remains detailed to the case.
f. Clarification and dates of defense planed trips. How firm are the dates?
g. The school and the dates of the law of war course the DDC plans to attend.
h. An explanation why Professor Wilson's schedule is relevant as Mr. Wilson has not appeared?
i. Whether the Defense believes that if a schedule is set, and thereafter Professor Wilson first appears and asserts a meaningful conflict, should that asserted conflict then open a new round of docketing discussions?

j. If the answer to 2i is "yes," an explanation why Mr. Wilson should not be caused to make an appearance now, assert his calendar as a docketing factor, and then request excusal from individual sessions to which his presence is not required.

k. Has the accused agreed to Professor Wilson's representation?

2. It appears that there are too many factors to consider in attempting to set this docket by email. Accordingly, the Presiding Officer will hold an 8-5 conference on either 23 Feb or 10 March. Whatever representative(s) attend for a party will be able to speak for and commit all other representatives of that party. If such a representational status is unacceptable to a counsel, then that counsel shall attend. There are three options:

a. All counsel who want to be heard on the docket come to the Presiding Officer's location which is the same as LtCol Vokey's. The Presiding Officer is not part of the process by which the attendees will

fund travel. If this option is used, Cpl. Basto at [redacted] will advise as to airport options and suitable hotels.

b. All parties travel to Washington with the Chief Prosecutor's and Chief Defense Counsel's office (as appropriate) assisting with travel arrangements.

c. A conference call. While ordinarily the Assistant might make this arrangement, he does not have the capability. Accordingly, if a conference call is used, all counsel will work with the lead prosecutor in providing telephone numbers, and the chief prosecutor will set up the call.

3. The parties will discuss among themselves (that means without involvement of the Assistant or the PO) which option they choose and the date and time. Other dates or arrangements – mutually agreed upon - may be suggested to the Presiding Officer. If there is an inability to quickly set a time for a mutually satisfactory 8-5 conference or face-to-face visit in a manner set forth above, all counsel who want to be heard on setting the docket will attend a session of the Commission during the 27 March trial term as previously scheduled. In the interim, the Presiding Officer may elect to modify the proposed schedule to suit the need for a full and fair trial considering, but not controlled by, the proposed schedule submitted by the parties.

4. Unless specifically cancelled by the Presiding Officer, the parties are reminded that a session of the Commission in this case is still set for the March 27 trial term where the business shall be to set the docket, litigate any Discovery Order motions or other motions the parties desire to file, and voir dire of the Presiding Officer. The Presiding Officer may also require other business to be conducted at that session. If there is any case that would interfere with counsel attending, provide the details of that case and contact information for the judge so that the Presiding Officer can assist with counsel's attending sessions of the commission.

This email will be placed on the filings inventory as D 5 A.

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**D 5 – KHADR** **Prosecution Response** To Defense Motion for a Continuance **15 February 2006**

1. Timeliness. This Prosecution Response is filed within the timeline established by the Presiding Officer.

2. Relief. The Defense request for a continuance should be denied.

3. Overview. The Defense motion fails to demonstrate how the accused will be denied a full and fair trial if required to maintain the trial scheduled ordered by the Presiding Officer on 11 Jan 2006. The Prosecution requests that the current trial schedule remain in place with slight modifications to accommodate for LtCol Vokey's previously scheduled conflicts. If the Defense requests motions hearings in addition to those already scheduled, they could be litigated at an additional session at the discretion of the Presiding Officer. The Prosecution requests that the Presiding Officer direct parties to submit proposed trial dates prior to the next scheduled session.

4. Facts.

a. On 29 July 2005, the President ordered that the accused be subject to trial by military commission pursuant to the President's Military Order dated November 13, 2001.

b. Charges against the accused were approved by the Appointing Authority for Military Commissions on 4 November 2004 and referred to trial by Military Commission on 23 November 2005.[1]

c. Mr. Muneer Ahmad was detailed as a member of the defense team on 28 November 2005.[2]

d. Captain Merriam was detailed as Military Counsel for all matters relating to Military Commission proceedings involving the accused on 29 November 2005.[3]

e. Mr. Richard Wilson was detailed as a member of the defense team on 30 November 2005.[4]

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[1] Review Exhibit's 5 and 8.
[2] Review Exhibit 11.
[3] Review Exhibit 9.

f. The Assistant to the Presiding Officers emailed all counsel on 2 Dec 2005 advising them of the Presiding Officer's intent to hold an initial session in U.S. v. Khadr during the week of 9 Jan 2006.

g. The Presiding Officer issued a Discovery Order in U.S. v. Khadr on 19 Dec 2005.

h. On 11 Jan 2006, during the initial session in U.S. v. Khadr, the Presiding Officer announced a schedule of motions practice based on those submitted by counsel.

i. All counsel present subsequently agreed to those dates on the record.

j. LtCol Vokey was detailed as the "selected detailed defense counsel" to represent the accused on 20 Jan 2006.

5. Legal Authority.

a. President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001).
b. Department of Defense Directive 5105.70 (10 Feb 2004).
c. Military Commission Order No. 1 (Aug. 31, 2005).

6. Discussion.

a. The Prosecution is ready to proceed with trial as ordered by the Presiding Officer in PO 1 (I), subsequently modified in PO 1 (M).

b. The Prosecution requests that the current trial schedule remain in place with slight modifications to accommodate for LtCol Vokey's previously scheduled conflicts. If the Defense requests motions hearings in addition to those already scheduled, they could be litigated at an additional session at the discretion of the Presiding Officer. Some delay caused by LtCol Vokey's relatively recent addition to the Khadr Defense team is understandable; however it should not prevent all parties from proceeding with the current schedule.

c. The Prosecution recommends the Presiding Officer direct counsel for the Prosecution and Defense to meet in advance of the next scheduled session and be prepared to propose dates for trial on the merits and sentencing, in addition to any requests for additional motions sessions. In the event the parties cannot agree on trial dates, the Prosecution and Defense should each be ordered to provide proposed trial dates no later than the next scheduled session.

d. Prior to the beginning of the 11 January 2006 initial session in U.S. v. Khadr, the Presiding Officer directed counsel for the Prosecution and Defense to meet and discuss proposed dates for legal and evidentiary motions practice. As a result of that

[4] Review Exhibit 10.

meeting, counsel met and agreed on due dates for legal and evidentiary motions, responses, and replies. Counsel also agreed on hearing dates for motions. Those dates were presented to the Presiding Officer in an 8-5 session and read into the record during the 11 Jan 2006 session. These dates were further formalized in PO 1(I) signed by the Presiding Officer on 19 January 2006. PO 1 (M) subsequently rescinded and modified PO 1 (I), but did not make changes to the original dates agreed upon during the 11 January 2006 session.

e. These dates were agreed upon by counsel and took into account the schedules of counsel. The schedule was made with the caveat that LtCol Vokey was not currently assigned to the case and dates might have to be adjusted if LtCol Vokey was ultimately assigned and his schedule conflicted with the dates ordered during the session. These dates should only be adjusted to the extent required by LtCol Vokey's previous commitments that cannot be adjusted to meet the motions schedule ordered in PO1 (M).

f. As Lt Col Vokey noted in the Defense motion, he is one of four counsel assigned to the Khadr Defense Team. Presumably all of the additional counsel assigned to the case have been working on drafting legal motions to be filed by 24 February 2006 as agreed to on the record during the previous session. The three counsel in addition to LtCol Vokey have been detailed to the case since late November 2005 and have had over two and a half months to prepare motions making legal challenges to their client being tried by a military commission. Mr. Wilson and Mr. Ahmad have represented the accused in federal proceedings since at least as far back as the summer of 2004 and have made some of the same legal challenges in those proceedings that the Prosecution expects they will make before the Military Commission.

g. The Defense should be required to file legal motions no later than 24 February 2006 as ordered by the Presiding Officer. There does not appear to be a conflict in LtCol Vokey's schedule that would prevent the Khadr Defense Team from filing a majority of their legal motions by this date. To accommodate LtCol Vokey's previously scheduled case at Edwards AFB, CA on 29-31 March 2006, the motions hearing could commence the week of 3 April 2006 instead of 27 March 2006.

h. In the event that there are additional legal motions that were not filed as a result of LtCol Vokey's addition as counsel on this case, those motions could be filed at a later date and an appropriate hearing scheduled. The Prosecution and Defense can provide notice of any additional motions prior to the week of 3 April 2006 and a final trial schedule can be set at that time.

i. LtCol Vokey's schedule also appears to allow for the Defense to meet the previously established deadlines in relation to evidentiary motions. Discovery was served on the Defense on 31 Jan 2006 as required by the discovery order. In addition to the items served, the Prosecution will have a very limited amount of additional discovery filed as soon as requisite permissions are obtained. To the extent any of these additional items cause a delay, the Defense could file a motion for appropriate relief at an appropriate time.

j. According to the Defense motion, the Defense does not have the ability to burn copies of CD's, which apparently caused them a delay in disseminating discovery to the entire Khadr Defense Team. The Prosecution cannot explain why the Defense would not have this capability; however the Defense has the same computer technical support available to them as the Prosecution. The Defense motion is the first time the Prosecution has been made aware that the Defense does not have this capability. The Prosecution recommends the Defense make an appropriate request to technical support personnel and the Appointing Authority, if appropriate, to ensure they have this capability in the future.

k. In order to allow additional time for the Defense to prepare, the Prosecution will agree to move evidentiary motions, responses, and replies back one week. The hearing could be held as scheduled on 22 May 2006. Due dates for evidentiary motions would then be:

21 April 2006:	Evidentiary motions due
5 May 2006:	Motion Reponses Due
12 May 2006:	Motion Replies Due
22 May 2006:	Motion hearing (As previously ordered in PO 1 (M).

l. Requests for additional delays prior to trial on the merits could be made if the Defense needs additional time to prepare. Those requests should not impact the ability of the Defense to file, and the Presiding Officer to hear, a great majority of the legal and evidentiary motions as ordered in PO 1 (M), with the above noted modifications to account for LtCol Vokey's schedule. In the event the Defense has additional legal or evidentiary motions to raise, they could file a motion with the Presiding Officer at the appropriate time.

m. While the Prosecution agrees that reasonable accommodations should be made to take into account LtCol Vokey's previously scheduled commitments and allow adequate time to prepare, the Defense motion lists several additional factors that should not be considered in determining the trial schedule in U.S. v. Khadr. The Defense motion lists numerous commitments of Mr. Ahmad and Mr. Wilson and argues that hearings should be delayed until after the end of law school semester and graduation. Both Mr. Ahmad and Mr. Wilson signed affidavits prior to being detailed to the case which include the following language:

> "I will ensure that these proceedings are my primary duty. Prior to undertaking representation of an Accused, I will ensure that I can commit sufficient time and resources to handle an Accused's case expeditiously through its conclusion. In making this assessment, I am aware that the Presiding Officer

> may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the Presiding Officer's determination such a continuation would unreasonably delay the proceedings." [5]

The Defense motion suggests that hearings should be delayed until after the end of the law school semester and graduation in order to accommodate the schedules of Mr. Ahmad and Mr. Wilson. It is unreasonable to expect that commission proceedings will only take place during American University Washington College of Law's summer recess. The motion further lists several speaking or travel engagements that will impact the ability of counsel to prepare and attend the hearings currently scheduled. Representing their client during ongoing commission proceedings should clearly take precedence over speaking engagements and attending conferences. These commitments should be given very little weight in setting a trial schedule.

7. Burden of Proof. The burden is upon the Defense to establish their entitlement to any relief.

8. Oral Argument. No argument is required, but if the Defense is permitted to argue, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence. None.

10. Additional Information. None.

11. Attachments: None.

12. Submitted by:

[redacted]
Major, U.S. Marine Corps
Prosecutor

Assistant Prosecutors
[redacted] Lieutenant, JAGC, USN
[redacted] Lieutenant, JAGC, USNR

[5] RE's 10 & 11.

Hodges, Keith

From: Vokey LtCol Colby C[redacted]
Sent: Tuesday, February 21, 2006 9:37 PM
To: [redacted]

Subject: REFILING OF MOTION FOR APPROP RELIEF, OBJECTING TO PO'S DISCOVERY ORDER - US V. KHADR

Attachments: Khadr -MotionObjecttoPODiscoveryOrder - refiling of 21 Feb.doc

Khadr
ionObjecttoPODisco

Pursuant to Mr. Hodges' 17 Feb 06 email "Return of attempted filing: US V. OMAR KHADR - MOTION FOR APPROPRIATE RELIEF - OBJECTION TO PO'S DISCOVERY ORDER", the enclosed motion is a refiling of my earlier motion (dated 16 Feb 06). Request that my earlier motion be disregarded and the motion provided below, dated 21 Feb 06 replace the previous motion filing.

v/r
LtCol Vokey

<<Khadr -MotionObjecttoPODiscoveryOrder - refiling of 21 Feb.doc>>

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
for Appropriate Relief

Objection to Presiding Officer's Discovery Order and Request for the Commission to adopt the Discovery Rules and Procedure under Courts-Martial Practice

21 February 2006

1. This motion is filed by the Defense in the case of the *United States v. Omar Ahmed Khadr*, and addresses the need for this military commission to adopt the discovery rules and procedures under court-martial practice.

2. **Relief Requested**: The Defense requests this military commission to adopt the discovery rules and procedures employed in courts-martial practice and the applicable case law relevant thereto. Additionally, the discovery order should be modified to conform to such practice.

3. **Synopsis**: This Military Commission's procedures with respect to discovery are incomplete and minimal. Discovery is a foundational process to a full and fair trail. The military commission should adopt the discovery rules and procedures under court-martial practice and the applicable appellate history. As such, the discovery order and discovery obligations should be modified to such practice.

4. **Burdens of Proof and Persuasion**: The burden is upon the Prosecution to justify departure from the established procedures in courts-martial and federal court practice, particularly since those standards have been implemented in order to provide defendants therein a full and fair trial.

5. **Facts**: This is a legal question concerning what law in the area of discovery should apply to this military commission.

6. **Argument:**

A. Appropriate discovery procedures and obligations are part of Due Process protections and establishing discovery procedure and obligations protects Mr. Khadr's right to a fair trial.

This Military Commission is governed by the requirements of Due Process. The government compliance with discovery obligations is part of the Due Process protections inherent in a fair trial. *See Brady v. Maryland*, 373 U.S. 83 (1963). As the discovery procedures and obligations are scantly addressed in the orders and instructions governing this military commission, adopting the discovery procedure and obligation as practiced in courts-marital is necessary to a full and fair trial. The Supreme Court has expressly opined, "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[1] The Due Process standard that courts apply when reviewing military tribunals' procedures is deferential: "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces. U.S. Const., Art. I, § 8."[2] In this instance, however, there is no need or cause for such deference. Neither Congress nor the President has attempted to foreclose the application of established discovery procedures and obligations. Accordingly, the Due Process Clause's "measure of protection [for] defendants in military proceedings,"[3] provides Mr. Khadr with a right to discovery and access to evidence in preparation of his defense.

One fundamental—and sure to be recurring—problem in military commission practice is the question of how to fill gaps in procedural and evidentiary rules. Adopting established rules will ensure that further creation of "commission" rules and procedures after the fact will be avoided.

Compared to the 2005 Manual for Courts-Martial (M.C.M.), or the Federal Rules of Criminal Procedure, the orders and instructions establishing commission procedures are sparse. But the procedural gulf between the two established federal criminal justice systems and the military commission system is even wider than the disparity in their formal governing rules

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1 Weiss v. United States, 510 U.S. 163, 176 (1994).

2 *Id.* (quotation marks omitted).

3 Weiss, 510 U.S. at 176.

would suggest. In both the federal civilian and court-martial systems, extensive case law augments the already-detailed procedural rules. The commission system, however, has no such case law backdrop. Procedural lacunas are, therefore, inevitable, and will likely be extensive.

Fortunately, a ready source of procedural guidance exists to fill many of those gaps: the M.C.M. As has every M.C.M. since the 1928 Army Manual, the 2005 M.C.M. provides that "[s]ubject to any applicable rules of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts **shall** be guided by the appropriate principles of law and rules of procedures [sic] and evidence prescribed for courts-martial."[4] Thus, to the extent that court-martial practice in the area of discovery does not conflict with the specific provisions of a military commission order or instruction, it must govern the commission process. Such action will provide all participants with a familiar framework which has been developed and explained by appellate history; promoting a full and fair trial.

B. The Presiding Officer's discovery order fails to correct the complete absence of discovery procedures and obligations.

The discovery order is inherently flawed in its inability to address necessary discovery procedures and obligations. Some examples of the failure of the discovery order and the absence of discovery procedures and obligations in this system are:

a. The failure to place a burden to disclose information on the Prosecution as referenced within R.C.M. 701(6); the Navy's Judge Advocate General's Instruction 5803.1c, Rule 3.8; and the ABA Model Rules for Professional Conduct, Rule 3.8.

b. The military commission regulations' failure to address or create any "due diligence" standard applicable to the government to discover evidence. (*See* United States v. *Williams*, 50 M.J. 436, 441 (CAAF 1999))

c. The military commission regulations' and the discovery order's failure to reflect an obligation on the Prosecution to assist, if requested by the Defense, in obtaining access to evidence "which is material to the preparation of the defense". (*See* R.C.M. 701(2), and addressed in *Williams* as well)

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[4] 2005 M.C.M., Pt. I, ¶ 2(b)(2) (emphasis added).

d. The Presiding Officer's requirement that the defense disclose potential defenses to the Prosecution that is not required under court-martial practice.

e. The lack of any right for Omar Khadr to confront witnesses against him.

f. The absence of evidentiary rules to ensure the veracity, completeness, accuracy and authenticity of any statement or writing, such as the general proposition that there "is no general rule against hearsay."

It would be unrealistic to believe that a discovery order can equate to the years of appellate review of issues relating to discovery, which has resulted in defining the discovery procedures and obligations for court-martial practice. The failure of the orders and instructions governing this Military Commission to adequately address the discovery process is an example of the system failing to provide a comprehensive and consistent set of rules. Such a situation works to deprive Mr. Khadr of a fair trial.

7. **Oral Argument**: The Defense requests oral argument on this motion, on the basis of the President's Military Order of 13 November 2001, which requires that Military Commission proceedings be "full and fair."

8. **Witnesses and Evidence**: None.

9. In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

10. **Attachments**: None.

By: //s//
C. C. VOKEY
Lieutenant Colonel, U.S. Marine Corps
Selected Detailed Defense Counsel

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Friday, February 17, 2006 1:47 PM
To: [redacted]
Subject: Resending: Return of attempted filing: US V. OMAR KHADR - MOTION FOR APPROPRIATE RELIEF - OBJECTION TO PO'S DISCOVERY ORDER

The below email is being resent because of the large number of email "bounces" I received. Apparently LtCol Vokey's LAN system changes the email addresses.

Keith Hodges
Assistant

-----Original Message-----
From: Hodges, Keith
Sent: Friday, February 17, 2006 1:45 PM
To: [redacted]
Subject: Return of attempted filing: US V. OMAR KHADR - MOTION FOR APPROPRIATE RELIEF - OBJECTION TO PO'S DISCOVERY ORDER

LtCol Vokey,
The Presiding Officer directed me to communicate the below to you.

1. Your motion stated, "The defense has previously provided the Presiding Officer with suggestions to improve the discovery order and these documents are attached to this motion as attachment (1) and attachment (2)." Para 10 said there were no attachments, and in fact there were none. Please clarify this by amending the motion (refiling or an amendment in the body of an email) whether there are attachments, and if so, identify and provide those attachments.

2. The time for the Prosecution response will not begin until this motion is placed on the filings inventory, and that will not occur until there has been compliance with paragraph 1 above.

3. The Presiding Officer has requested that I bring another matter to your attention. Your motion requests only one form of relief, as I understand it, and that is the discovery RCMs should be used in lieu of the Discovery Order. Of course you can request any relief you wish.
However, you might consider that if the Presiding Officer does not grant the relief you requested, you have not requested relief from any particular provision of the Discovery Order. Should the Presiding Officer deny your motion as written, you are advised that since you did not request an alternative form of relief in this motion as to the particulars of the Discovery Order, you have waived that avenue. The Presiding Officer cannot accept serial filings as to the same matter. If you have alternate remedies to offer, you must present them in this motion if you desire the Presiding Officer to act on them.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

-----Original Message-----
From: Vokey LtCol Colby C[redacted]
Sent: Friday, February 17, 2006 12:33 AM
To:[redacted]
Subject: US V. OMAR KHADR - MOTION FOR APPROPRIATE RELIEF - OBJECTION TO PO'S DISCOVERY ORDER

Attached is the defense motion for appropriate relief - objection to the Presiding Officer's Discovery Order.

V/R
LtCol Vokey

Lieutenant Colonel C.C. "Danger" Vokey
Regional Defense Counsel,[redacted]

<<Khadr -MotionObjecttoPODiscoveryOrder.doc>>

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Wednesday, February 22, 2006 4:49 PM
To: Sullivan, Dwight, COL, DoD OGC; [redacted]
Cc: [redacted]

Subject: RE: Entry of Appearance ICO United States v. Khadr, Case No. 05-0004

The Presiding Officer instructed the following be communicated to the parties.

1. Receipt of Professor Wilson's notice of appearance is acknowledged.

2. Per the APO e-mail provided as Attachment B to Professor Wilson's "packet," all detailed counsel and civilian counsel representing an accused are expected to be present for all scheduled Commission sessions unless they have been excused by their client and counsel have otherwise complied with the requirements of the above mentioned e-mail concerning excusal of counsel.

3. It is noted that Mr. Wilson has filed his notice of appearance under "protest." The protest, what that means, and whether relief is requested is not understood. If the defense desires to contest Commission procedures or seek relief from the Presiding Officer, they must file an appropriate motion and comply with the requirements of POM 4-3. Otherwise, the issue will be considered waived. Likewise, Professor Wilson listed several assertions concerning Commission Law and practice. Those matters, like the "protest," are not before the Commission for resolution until such time as a motion is filed in accordance with POM 4-3.

4. Civilian Counsel are expected to abide by the terms of Commission law regarding representation of an accused to include their signed agreement executed prior to being qualified as a civilian defense counsel authorized to appear before a military commission. Failure to comply will be treated in accordance with the procedures delineated in paragraph 4.A.(5)(c) of MCO 1 dated 31 August, 2005.

5. This email will be noted on the filings inventory and a copy made a Review Exhibit.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

From: Sullivan, Dwight, COL, DoD OGC [redacted]
Sent: Tuesday, February 21, 2006 8:01 AM

To: [redacted]
Cc: [redacted]

Subject: Entry of Appearance ICO United States v. Khadr, Case No. 05-0004

Colonel Chester,

Pursuant to Military Commission Instruction No. 5, para. 3.B(5) (April 30, 2003), I hereby communicate Professor Richard J. Wilson's attached written entry of appearance, with two attached exhibits, to the military commission. Please note that, as explained in the attached correspondence, Professor Wilson's entry of appearance is conditional and made under protest.

Respectfully Submitted,

Dwight H. Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

AMERICAN UNIVERSITY
WASHINGTON, DC

February 19, 2006

CLINICAL PROGRAM

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]
Arlington, VA 22202

Re: Entry of Appearance in U.S. v. Khadr

Dear Col. Sullivan:

By means of this letter I request that you enter my appearance as detailed civilian defense counsel for Omar Ahmed Khadr. I take this action under protest, and I ask that you forward this letter with your formal entry of appearance so that it becomes part of the record in these proceedings. My entry of appearance is also conditional, in that it is contingent upon the desires of Omar Khadr to retain me as civilian defense counsel, as explained below.

I am a tenured professor at the Washington College of Law at American University in Washington, DC. I have held the rank of Professor of Law, the highest academic rank granted by the university, since 1995. I also act as director of the International Human Rights Law Clinic there, which is an operating law firm within the law school. This year, the clinic has an enrollment of 32 students, and there are four full-time faculty members including myself who teach and supervise students in their casework in the clinic, under my coordination. In recent years, our clinic has handled some 60-80 cases in local, national and international tribunals. All of our services are *pro bono*, and the work of the clinic is supported almost solely by funds from the law school budget. Our clients, including Omar Khadr, are persons who would be unable to retain the services of private counsel, and all costs of litigation are absorbed by the school. In my capacity as a senior member of the faculty, I have teaching responsibilities outside of the clinic; significant institutional and administrative responsibilities that are part of my faculty responsibilities; and an expectation, as an international scholar in the field of human rights, of significant travel for conferences, consulting and other academic endeavors. Finally, there is also a significant expectation that, as a professor, I will continue to publish scholarly work related to my fields of study.

I first became involved in this case in July, 2004, when I contacted the Center for Constitutional Rights in New York and volunteered to serve as counsel for any detainee at Guantanamo Bay. I made the request because of the decision of the Supreme Court in

Rasul v. Bush, 542 U.S. 466 (2004), which held that the detainees had the right to access to the courts. and that venue was appropriate in a local court in which I am licensed to practice, the Federal District Court for the District of Washington, D.C. I agreed to take the case of Omar Khadr, and was immediately joined in his representation by my faculty colleague, Prof. Muneer Ahmad. Both of us have worked without compensation from any source since the time we assumed his representation, and all expenses and costs of litigation are borne by the law school or personally, including the significant costs of travel to and from the U.S. Naval Base at Guantanamo Bay.

By virtue of conditions on our representation imposed by the government, both Prof. Ahmad and myself have requested and been granted security clearances at the level of "Secret", which were granted shortly after we entered our appearance in the federal court in the late summer of 2004. In addition, we have signed documents indicating our willingness to comply with protective orders in both the original habeas corpus litigation on behalf of Omar (hereafter, "habeas litigation"),[1] and there are similar protective orders in this litigation before a military commission.

The conditions imposed by the protective order in the habeas litigation make visits with our client extremely burdensome and difficult. Because of the position asserted by the government in the habeas litigation[2] and other administrative delays caused only by the Department of Justice or Department of Defense, we were not able to carry out our first visit with Omar until sometime in November 2004. At that time, he agreed to allow us to represent him in the habeas litigation, and we signed a retainer agreement to that effect. Since that time, in compliance with the rigorous rules governing client visits, note-taking with a client, and the use of a secure site for review of all notes from client interviews, which severely inhibit our ability to carry out the defense of our client, we have made a total of 5 trips to Guantanamo Bay, either together or separately, in conjunction with the habeas litigation. These trips were taken between November 2004 and October 2005, prior to the announcement of formal charges before a military commission. On all occasions but one, in which we were able to fax our interview notes from the base at Guantanamo via secure fax directly to the secure site in the Washington, DC area, we sent our notes by mail, which normally took about one month for delivery from the base. All attorney-client correspondence goes through a similar review process, meaning that the normal course of attorney-client correspondence involves delays of one month for delivery in either direction. We are not able to talk with Omar by phone, and his family and Canadian counsel correspondence is routed through normal detainee mail screening, which requires significant additional delays not caused by us. Although Omar speaks and writes in English, his proficiency, particularly in written English, is extremely limited, thus making correspondence extremely slow and difficult.

In addition, Omar was a child of 15 at the time of his capture in Afghanistan, and 16 at the time of his arrival at Guantanamo Bay in October of 2002. Although he had turned 18 by the time of his first access to any counsel, he is still quite young, and our role as counsel for him is complicated by our role as his legal representatives while, at the same

[1] In re Guantanamo Detainees, 344 F. Supp. 2d 174 (D.D.C. 2004).
[2] United States v. Al Odah, 329 F. Supp. 2d 106 (D.D.C. 2004).

time, being the only adults capable of assessing his "best interests" as a minor. Those two interests are not always congruent, and are complicated by the very real developmental and emotional issues of adolescence, both physically and mentally, taking place in the context of continuous interrogation and prolonged periods of confinement in isolation without contact with any human being other than interrogators.

My last visit with Omar was in October of 2005. I met with him by myself, and our discussions were cordial but short – they took place over a few hours on a single day. I again visited the base with Lt. Col. Vokey from February 3rd through 6th, 2006. Despite our best efforts, I was unable to gain access to Omar during my visit despite my presence on the base from mid-day on the 4th through the morning of the 6th. Therefore, I have not personally discussed with him his desire to retain me as civilian defense counsel before the military commission. My next contemplated visit to the base is between March 14-17, 2006. I anticipate that I will be able to discuss his desires to retain me as additional civilian counsel at that time.

Formal charges before a military commission were levied against Omar in November of 2005, more than three years after his initial confinement and after interrogations which have taken place regularly – usually several times weekly – since his arrival at the base, and indeed before that at Bagram Air Force Base in Afghanistan. He has not had access to counsel in any of those interrogations, and was without any advice from counsel, whether of his choice or assigned, until our first visit with him in November of 2004. I have not visited with him, nor have I discussed the specific substance of the allegations against him, since the time he was charged. By virtue of the commission rules regarding civilian counsel, I continue to provide representation without compensation from the government on an entirely pro bono basis, and in addition to the responsibilities of my full-time job as a law school professor, as set out above.

I did sign Annex B to MCI No. 5 at the time that I requested to be detailed to this case, but I did so with serious reservations, and under protest. While I did not express those reservations in writing at the time, I was aware of the concerns expressed in academic scholarship and the writings and analyses of various human rights NGOs regarding the serious structural limitations imposed on the ability of the defense to perform that role within the various rules imposed by military commission orders and instructions. While those limitations will not be rehearsed here in detail, suffice it to say that I was aware of an ethics opinion of the National Association of Criminal Defense Lawyers (NACDL) suggesting that "it is unethical for a criminal defense lawyer to represent a person accused before these military commissions."[3] That opinion, issued in August of 2003, has continued in force, although NACDL has since taken a less strident position in practice regarding the appearance of counsel in these proceedings.

The concerns of NACDL in its ethics opinion regard the ability of a civilian defense lawyer to adequately perform his or her duties within the structural constraints imposed on defense counsel. Structural constraints are different than those that involve the specific training or skill of an individual attorney; they go to the nature of rules of the tribunal

[3] NACDL Ethics Advisory Committee, *Opinion 03-04* (August 2003) (attached hereto as *Exhibit A*).

before which counsel appears that impede an effective defense. These concerns, without exclusion of others that might arise in the course of representation, are three: (1) inherent elements of the rules of this tribunal with regard to the limits on civilian defense counsel's ability to participate fully in the proceedings; (2), the lack of equality of arms between the prosecution and defense in the preparation of their cases for trial; and (3), artificial and unrealistic contractual commitments required of counsel in the signing of Annex B to MCI No. 5 which require counsel to attest that he will be available for a single case at the expense of all other clients and/or other professional responsibilities, without regard to the actual circumstances and dates of hearings, and without further regard for the availability of co-counsel capable of providing effective and zealous representation to Omar Khadr. Let me address each of these issues in turn.

First, it is my view, and that of many other critiques of the commission process, that Military Commission Order No. 1, which permits the presiding officer to provide access to certain protected information to civilian defense counsel and the accused only "to the extent consistent with national security, law enforcement interests, and applicable law," while requiring access by detailed military defense counsel, is improper for several reasons. It creates the potential to improperly deny civilian defense counsel full information necessary to perform their role as counsel for the accused. Moreover, it impedes the ability of the defense team to communicate and decide on defense strategy. Obviously, denial of classified information to the accused also impedes his ability to know the nature of the evidence against him, to confront adverse witnesses, and to rebut that evidence, if false. Limitations on access to classified information at the "secret" level are also unnecessary because civilian defense counsel has received clearance at that level and is subject to the additional constraints of the protective orders in this litigation.

Second, the structures create an improper inequality of arms with the prosecution team. The concept of equality of arms is clearly applicable in these proceedings by virtue of the direct application of international human rights law to these proceedings.[4] Equality of arms is "one of the features of the wider concept of a fair trial, [in which] each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his or her opponent." Öcalan v. Turkey, 41 E.H.R.R. 45, at ¶ 140 (2005); Edwards & Lewis v. United Kingdom, 40 E.H.R.R. 24, ¶ 59 (2004). The circumstances in the Öcalan case are remarkably like those in the case at bar, with the exception that the defendant here was not an adult at the time of his initial detention, but a child. In Prosecutor v. Tadic, Trial Chamber, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 17 Nov. 1996, Judge Vohrah stated the following with regard to the right to equality of arms:

> The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side . . . . It seems to me . . . that the application of the equality of arms principle especially in criminal proceedings should be inclined in favor of the

[4] See, *Appointing Authority Decision on Challenges for Cause*. Decision No. 2004-01, Oct. 19, 2004, at 8 et seq.

> Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.[5]

The concept of equality of arms also finds its corollary in domestic criminal procedure, in which certain procedural defects can work to deprive defense counsel of the abilities to perform his role, and thus creates a per se rule for reversal of a conviction based on ineffective assistance of counsel. United States v. Cronic, 466 U.S. 648 (1984). Among the circumstances in which per se violations of the right to effective assistance of counsel occur are those "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not," or where the accused has "actually or constructively been denied counsel by government action." Bell v. Cone, 535 U.S. 635, 696, n. 3 (2002). I might note, in this regard, that the numerous prosecution teams, working full time and based together in Washington, DC, includes a literal army of investigators who presumably began their work at the time of Omar's initial detention in July 2002, now nearly four years ago. All defense counsel presently serving on this case work on a part-time basis, scattered throughout the United States, and some of us work without compensation or government resources to support what appears to require world-wide investigation. The longest-serving counsel, myself and Prof. Ahmad, have been able to speak directly with Omar only since November of 2004. As I have noted, we have had only a few short visits with him under the most onerous and difficult conditions for visitation, and only the last of which dealt with the substance of the charges he now faces, without all counsel present. Detailed military defense counsels' situation is similar but more recent.

Third, Annex B of MCI No. 5, which must be signed before civilian defense counsel is permitted to be detailed to any case, states that "I will assure that these proceedings are my primary duty." Annex B, at II, B. This provision, without reference to the specific schedule of this case, the composition of the defense team, or the relative importance of any given hearing, violates my ethical obligation to attend fully to all of my clients and to my other professional responsibilities while providing zealous and competent representation in this case, which I fully intend to do. Moreover, although the email of December 16, 2005, from the presiding officer to counsel in this case seems to suggest that counsel can provide justifiable excuse for absence a particular hearing, the procedure in question is set out in some detail in an electronic message that appears to have no legal effect as "commission law".[6] Moreover, the email suggests that the decision as to whether all civilian defense counsel will appear at all proceeding can be waived only by written consent of the client and "lead counsel" for the defense for any particular session, but also appears to leave the ultimate decision as to whether an absence will be excused in the discretion of the presiding officer. These requirements also unduly burden civilian defense counsel, including the willingness of the presiding officer to accept assurances from a member of the defense team who has "personally spoken" with the accused, in that personal conversations with Omar have only taken place on a face-to-face basis to

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[5] Decision available at http://www.un.org/icty/tadic/trialc2/decision-e/61127ws21.htm.

[6] Email from Keith Hodges, *Presence of Counsel at sessions at GTMO: US v. Khadr*, December 16, 2005, attached at Exhibit B.

date, with no phone contact permitted. Omar only met his assigned military counsel early this month. While I believe that it will be important to him to feel that he has continuity of representation from lawyers that he trusts, that is, Prof. Ahmad and myself, I cannot assure you that he will accept me as one of his lawyers in the military commission process.

In conclusion, this letter is submitted of my own volition, and not in response to a suggestion in the email of February 16, 2006 that I should be "caused" to appear. I enter my appearance in this case in order to protect the rights of Omar Khadr and to contribute to his defense through the common efforts of the defense team. I do not believe that I should be forced to make the decision between declining representation and appearance at every commission session (at my own expense) without regard to importance, content or timing of that event. Appearance of particular members of the defense team at any session of this commission's proceedings should, in my view, lie within the sound discretion of defense counsel, and not with the discretion of the presiding officer or the accused. Omar is a young person accused of crimes committed as a child, with his counsel presumably acting as advocates for him, in his best interests. While I recognize that we should explain our decisions as to the appearance of particular defense counsel at any session, it is unnecessary and inappropriate to require Omar's permission for absence of a particular member of the team on any occasion. No such rule, ethical or legal, applies in any other context of legal representation by multiple counsel, to my knowledge.

I am more than happy to swear to the contents of this letter under oath, or to submit this information in a more formal fashion. I seek no relief based on my assertions in this letter, at least at this time. I do seek to fully inform the parties and the presiding officer of the context in which I make my entry of appearance, and my reasons for doing so under protest.

Sincerely,

Richard Wilson

Prof. Richard J. Wilson

Cc: Omar Khadr (via mail, as described above)

NACDL ETHICS ADVISORY COMMITTEE
Opinion 03-04 (August 2003)
Approved by the Board of Directors at the
NACDL Annual Meeting, Denver, CO, August 2, 2003

Question Presented:

The NACDL Ethics Advisory Committee has been asked by the NACDL Military Law Committee the following question: Given the restrictions placed on civilian defense counsel, what are a criminal defense attorney's duties to the client before a Military Commission at Guantanamo Bay under Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001), and its implementing instructions issued April 30, 2003?

Digest:

It is NACDL's position, by unanimous vote of the Board of Directors on August 2, 2003 having considered MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B, although it says it is not, in spite of the clear language of the MCI's.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the serious and unconscionable risks involved in violating Annex B, including possible indictment, *see* note 35, *infra*, every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.

A military or civilian lawyer representing an accused person before a military commission at Guantanamo Bay under the 2001 Military Order must provide a zealous and independent defense, notwithstanding the severe limitations imposed on counsel and the denials of due process and attorney-client confidentiality and privilege by the Military Commission Instructions. The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits on counsel imposed by the government, in violation of the UCMJ and treaties the United States has signed guaranteeing rights to the accused before these commissions. Criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions.

A military or civilian lawyer appearing before a military commission at Guantanamo Bay under the 2001 Military Order should not be involved unless the lawyer is qualified to handle death penalty cases in the lawyer's local jurisdiction or in the federal or military courts. Counsel must assume that every one of these cases is presumptively a death penalty case, even though the rules do not require, as in the civilian courts, that the government provide timely notice that it is a death penalty case or even allege an aggravating circumstance to support the death penalty that the government will seek to prove beyond a reasonable doubt.

If counsel appearing before a military commission has an ethical quandary that cannot be resolved, the lawyer should consult with their state bars. Defense counsel are cautioned, however, that if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret because a breach of security could lead to defense counsel being indicted. One must assume that defense counsel's calls from Guantanamo Bay will be monitored, too.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is prosecuting, and it gains no respect from the international community, and even its own citizens.

Ethical Rules, Federal Regulations, Statutes, and Constitutional Provisions Involved:

U.S. Const., Art. I, § 8 (war powers in Congress) & Art. II, § 2 (President is commander-in-chief)
"Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)
28 U.S.C. § 530B
28 C.F.R. § 77.3
Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*
Geneva Conventions of 1949, III (GPW), IV (civilians)
Military Commission Order No. 1 (March 21, 2002)
Military Commission Instructions (April 30, 2003):
- No. 4: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel
- No. 5: Qualification of Civilian Defense Counsel and Annex B (Affidavit and Agreement of Civilian Defense Counsel) (as amended, undated)

Manual for Courts Martial, Preamble ¶ 2 (2000)
Rules of Professional Conduct (1983):
- Preamble: A Lawyer's Responsibilities
- Rule 1.1 (competence)
- Rule 1.6 (confidentiality)
- Rule 1.7(b) (personal conflict of interest)
- Rule 1.16 (declining or terminating representation)

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003)

Opinion:

I. INTRODUCTION

A. NACDL's Previous Committee Positions on The Question Presented

The Military Law Committee has raised a difficult question that has been touched on in an NACDL Board of Directors resolution of May 4, 2002 (quoted *infra*), and is related to our comments to the Department of Justice in opposition to the adoption of 28 C.F.R. § 501.3 in December 2001[1] **and Ethics Advisory Opinion of November 2002[2] involving the duty of an attorney to a client when the attorney learns that attorney-client communications are subject to monitoring under § 501.3. We concluded as to the latter:**

> **A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protects attorney-client communications from disclosure to the government.**

NACDL Ethics Advisory Committee Op. 02-01, at 1 (Nov. 2002).[3]

B. NACDL Board Resolution on Military Commissions, May 4, 2002

The NACDL Board of Directors passed the following resolution on Military Commissions on May 4, 2002 where we have already questioned the constitutionality, violations of human rights treaties, and fundamental fairness of the government's plan for the current system of military commissions:

> **Resolution of the NACDL Board of Directors**
> **Regarding Military Commissions**
> WHEREAS the National Association of Criminal Defense Lawyers, whose

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[1] http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument.

[2] http://www.nacdl.org/public.nsf/freeform/attorneyclient?opendocument.

[3] *See generally* Ellen S. Podgor & John Wesley Hall, Essay, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, __ GEO.J.LEGAL ETHICS ___ (Vol. 17, No. 1, 2003) (discussing NACDL's positions in opposition to the promulgation of 28 C.F.R. § 501.3 in NACDL's position paper and NACDL Op. 02-01).

members have dedicated their professional lives to defending the Constitution of the United States, supports efforts to bring to justice those responsible for the September 11, 2001 attack on our country;

WHEREAS the rest of the world will note how we treat those persons captured by American forces in the military actions against terrorism;

WHEREAS it is imperative not only that the United States set an example for fair and humane treatment, but that our efforts be perceived as fair and just;

WHEREAS the United States cannot be, or be viewed as being, willing to depart from its own laws and principles;

WHEREAS the international view of the United States as being willing to depart from its own laws and principles imperils our country's men and women in uniform across the world;

WHEREAS our dedication to the rule of law drives our positions on the creation of military commissions and the rules that will govern them;

WHEREAS we object to the creation of the particular military commissions reflected in the Presidential Order of November 13, 2001, on the basis that the President was not empowered by law to unilaterally create these commissions;

WHEREAS moreover, that position unchanged, the procedures announced as governing such commissions, as promulgated by the Secretary of Defense on March 21, 2002, are also inadequate as a matter of fundamental fairness;

WHEREAS the Preamble to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), states that such commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial;"

WHEREAS NACDL supports the principle articulated in the Preamble to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), and the procedures promulgated by the Secretary of Defense do not comply with the provisions of the MANUAL FOR COURTS-MARTIAL,

THEREFORE BE IT RESOLVED that NACDL opposes implementation of the procedures promulgated by the Secretary of Defense for these commissions;

IT IS HEREBY FURTHER RESOLVED that NACDL shall urge the President and the Congress of the United States, as well as appropriate judicial tribunals, to find that these procedures promulgated by the Administration to date violate principles of fundamental fairness, and threaten our country's stature and the welfare of its military personnel throughout the world, and thus that such rules

should be revised by the Secretary of Defense through amendment of his Order of March 21, 2002, to make applicable to such commissions the Uniform Code of Military Justice and the Manual for Courts-Martial.

APPROVED this 4th day of May, 2002
Cincinnati, Ohio

We are not alone in questioning the constitutionality and fundamental fairness of these proceedings. Several law review articles by distinguished scholars on constitutional and military law find these military commissions are: an unconstitutional exercise of the War Power reserved to Congress; U.S. Const., Art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-46 (1952); an unconstitutional suspension of the writ of habeas corpus, fundamentally unfair and a denial of due process, and a violation of human rights under international law. We cannot add to them here, so we merely cite and rely on them.[4]

We share the concern of these scholars and others[5] that the stature of the United States as a world power is denigrated by these closed proceedings that are fundamentally flawed in their obvious potential for denial of a fair trial and the appearance of impropriety for failure to follow our own law and international law and utilize the UCMJ for trials before Military Commissions. While the government publicly seeks to assure a fair trial, and we know that defense counsel will zealously defend, as is their sworn duty, the limits on defense counsel, the secrecy of the proceedings, the due process flaws, including the denial of applicability of the UCMJ and protections of double jeopardy[6] and all other rights we hold as U.S. citizens,[7] all will lead the rest of the world to believe that the persons tried before these commissions were not treated in accord with our national beliefs

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[4] George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002); Neal K. Katyal, Essay, *Waging War, Deciding Guilt: Trying Military Tribunals*, 111 YALE L.J. 1259 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002).

[5] In addition, newspaper and magazine articles and columns too numerous to cite have raised the same concerns.

[6] Art. 86 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.S.T.S. 135, 6 U.S.T. 3316, T.I.A.S. 3364, guarantees double jeopardy protection.

[7] For a comprehensive discussion of lost rights, see Donald G. Rehkopf, Jr., *Military Commissions: A Primer for Defense Counsel* (2003) (CLE paper, first delivered in Detroit, May 2003). *See also* Jack B. Zimmermann, *Liberty at risk, Part 5: Handling legal aspects of captured al Qeada detainees*, THE CHAMPION 53, 54-55 (July 2002).

in the "Rule of Law,"[8] due process of law,[9] or international law.[10] In a World War II war crimes trial, two dissenting Justices of the U.S. Supreme Court were taken aback by our disregard for "elementary due process" and international law. *See Application of Yamashita*, 327 U.S. 1, 27-28, 49 (1946) (Justices MURPHY and RUTLEDGE dissenting, respectively).

Therefore, our own service members and citizens captured by an "enemy" abroad are even more likely to be subjected to similar denials of due process or atrocities in foreign lands.[11] We are not "leading by example" as a free nation should. Our government is

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[8] One cannot help but note that the "Rule of Law" was politically invoked to impeach the last President for lying about a private sexual matter, but now is being ignored for political convenience by many of the same persons who relied on it before in the name of "national security." The President takes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." All federal officials take a similar oath. These military commissions do not "preserve, protect and defend the Constitution of the United States"—they make a mockery of it.

[9] The application of the UCMJ to military commissions would provide due process. The current regime does not.

[10] For example, Art. 84 of the Geneva Convention requires that a prisoner of war be tried in a military or civilian court. Manuel Noriega was prosecuted in a civilian court for drug crimes and RICO offenses after he was captured during the Panama invasion. *United States v. Noreiga*, 746 F.Supp. 1506, 1525-26 (S.D. Fla. 1990), *later opinion*, 808 F.Supp. 741, 796 (S.D. Fla. 1992) (Noriega was a "prisoner of war" under the Geneva Convention; he was allowed to wear his military uniform during the trial), *aff'd*, 117 F.3d 1206 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

[11] *See Noriega*, 808 F.Supp. at 803:

> [T]hose charged with that determination [Noriega's confinement location and status] must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views this Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.
>
> In the turbulent course of international events . . . the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented. (bracketed material added)

This happened in both the Vietman conflict and the 1991 Gulf War. In Vietnam, our captured service members were treated as an invading force and denied the benefits of the Geneva Convention. In the 1991 Gulf War, a female pilot and her crew were shot down, and she

demonstrating a disregard for the protections of our own legal system and moral principles by circumventing established domestic and international law. *See Yamashita*, 327 U.S. at 81 (Justice RUTLEDGE dissenting), quoted *infra*. One cannot help but feel that secret trials with secret evidence, evidence sometimes even presented in secret from the accused and defense counsel, with little restrictions on the admissibility of evidence and ignoring the requirement that the protections and procedures of the UCMJ are applicable to military commissions[12] and Geneva Convention will lead to unjust[13] and unreliable results that will lead to these proceedings being viewed as a mere way station on the way to an inevitable conviction and probable execution.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is

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was repeatedly raped, tortured, and otherwise degraded. Zimmermann, note 7, *supra*, at 54. Many other of our shot down POWs were tortured, including men threatened with rape and sexual abuse, and their suffering is recounted at length in *Acree v. Republic of Iraq*, 2003 WL 21537919 (D. D.C. 2003), *later opinion*, 2003 WL 21754983 (D. D.C. 2003).

[12] MANUAL FOR COURTS-MARTIAL, Preamble ¶ 2(b)(2) (2000) requires that military commissions ". . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial."

UCMJ, Art. 36, 10 U.S.C. § 836, provides:

> Art. 36. President may prescribe rules
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

The question then is: May the DoD determine that special rules are required for military commissions that are actually "contrary to or inconsistent with the" UCMJ? We believe not. Congress mandated that application of the procedures of the UCMJ to commissions and tribunals be consistent with it, and the President cannot simply ignore Congress, in his capacity as Commander-in-Chief.

[13] At the request of the British Prime Minister, our government recently decided to waive the death penalty for two British citizens in the initial six to be tried by the Military Commission and to permit them to have British counsel. Our government is now treating citizens of favored nations differently and granting them more rights than the others accused. A denial of equal protection is a denial of due process under American law and international law.

prosecuting, and it garners no respect from the international community, and even its own citizens.

II. WHAT ETHICAL LAW GOVERNS LAWYERS BEFORE COMMISSIONS?

When a military or civilian lawyer appears before a military commission or tribunal, what ethical law governs? It is clear that lawyers before a military commission must adhere to the Rules of Professional Conduct and are mandated to provide independent and zealous representation.

The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of limits on counsel imposed by the government.

A. RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000)

The RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000) provides that defense counsel in a military proceeding shall provide zealous representation the same as required of civilian lawyers:

> *General duties of defense counsel.* Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See* R.C.M. 901(d)(4)(D).

All prior versions of the MANUAL FOR COURTS MARTIAL or the RULES FOR COURTS MARTIAL required defense counsel to provide zealous, independent representation.

B. 28 U.S.C. § 530B

The "McDade Amendment," 28 U.S.C. § 530B(a), provides as follows:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties to the same extent and in the same manner as other attorneys in that State.[14]

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[14] The Department of Justice must defend the constitutionality of the McDade Amendment. *See* The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op.

28 C.F.R. § 77.3 is in accord:

> **In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in Sec. 77.2 of this part.**[15]

Off. Legal Counsel DOJ 25 (1981).

[15] *See also* 28 C.F.R. § 77.4 on "guidance":

> (a) Rules of the court before which a case is pending. A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.
>
> (b) Inconsistent rules where there is a pending case.
>
> (1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:
>
> (i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;
>
> (ii) Whether the local federal court rule preempts contrary state rules; and
>
> (iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.
>
> (2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.
>
> (c) Choice of rules where there is no pending case.
>
> (1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.
>
> (2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.
>
> (d) Rules that impose an irreconcilable conflict. If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable

Pre-McDade Amendment, it was held that there is no preemption of state ethics law when states seek to regulate the licenses of and discipline federal prosecutors, for example. *United States v. Ferrara*, 847 F.Supp. 964, 968-70 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C.Cir. 1995) (D.C. federal prosecutor licensed in New Mexico; no federal jurisdiction in D.C. to question state disciplinary action in New Mexico; state regulation of federal prosecutors was expressly authorized by Congress since 1980 starting in an appropriations act. (Pub.L. 96-132, 93 Stat. 1040, 1044 (1979)); *Matter of Doe*, 801 F.Supp. 478, 485-88 (D.N.M. 1992). Post-McDade cases are in accord. *Stern v. U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000); *Mendoza Toro v. Gil*, 110 F.Supp.2d 28 (D.P.R. 2000).

C. Military Regulations

Regulations of the branches of the military provide that military lawyers are governed by the Model Rules of Professional Conduct. Army Reg. 27-26 (1992); AF Rules of Professional Conduct (1989); Navy JAG Inst. 5803.1 (1987).

D. State Bar Influences and Control Under Military Law

Military case law and regulation recognize that military lawyers are still governed by their state bars and rules,[16] **as was reaffirmed by § 530B. *See, e.g., United States v. Baker*, 58 M.J. 380, 386 (2003) (applying free narrative approach to client perjury; also applying RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000)); *United States v. Wheeler*, 56 M.J. 919, 922 (A.Ct. Crim. App. 2002); *United States v. Beckley*, 55 M.J. 15, 23 (A.F.Ct.Crim.App. 2001); *United States v. Smith*, 35 M.J. 138, 140 (C.M.A. 1992) (state bar**

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obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) Supervisory attorneys. Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

[16] Army Reg. 27-26, *supra*, Rule 8.5, cited in John Jay Douglas, *Military Lawyer Ethics*, 129 MIL. L. REV. 11, 14-15 & n. 6 (1990).

Contra: Col. E. Albertson, *Rules of Professional Conduct for the Navy Judge Advocate*, 35 FED. B.J. 334, 336 (1988) ("when conflict exists between the state rule and the JAG rule, the latter prevails") (but, this article pre-dates the McDade Amendment and 28 C.F.R. § 77.3, so the Supremacy Clause is no longer an argument).

duties argued as controlling; declining to decide whether the Supremacy Clause overrides state bar rules); ***Rhea v. Starr,*** **26 M.J. 683, 684 (A.F.C.M.R. 1988).** ***See also United States v. Dorman,*** **58 M.J. 295, 299 n. 3 (2003) (relying on opinions of state bars for guidance).**

The appearance of impropriety standard applies in the military. ***United States v. Golston,*** **53 M.J. 61, 66 n. 5 (2000);** ***United States v. Lewis,*** **38 M.J. 501, 517 (A.C.M.R. 1993).**

E. Duty of Zealous Advocacy under Military Law

Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. RULES FOR COURTS MARTIAL 502(b)(6)(B), quoted *supra;*[17] ***United States v. Nicholson,*** **15 M.J. 436, 438 (C.M.A. 1983);** ***United States v. Rodriguez,*** **44 M.J. 766, 776 (N.M.Ct.Crim.App. 1996);** ***United States v. Thomas,*** **33 M.J. 768, 777 (N.M.Ct.Crim.App. 1991),** ***aff'd in part and rev'd in part on other grounds,*** **46 M.J. 31 (1997);** ***United States v. Whidbee,*** **28 M.J. 823, 826 n. 5 (C.G.C.M.R. 1989);** ***Martindale v. Campbell,*** **25 M.J. 755, 757 (N.M.C.M.R. 1987). "[T]he personal honor of the individual" is vitally important in the military.** ***Officer's Guide*** **2 (37th ed. 1973), quoted in Douglas, note 16,** ***supra.*** **Zealous criminal defense is a military tradition and duty.**

III. DUTIES BEFORE MILITARY COMMISSIONS

Because of the foreign nature[18] **of these military commissions established under the March 21, 2002 Department of Defense Military Commission Order No. 1 (MCO-1), criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions. The government on one hand states that zealous representation is required of detailed military counsel or civilian counsel, and then puts severe limits on counsel's ability to provide a complete defense.**[19]

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[17] In addition, RULES FOR COURTS MARTIAL 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation "because of the zeal with which such counsel represented any accused."

[18] Secretary of Defense Rumsfeld admitted in a press release with the adoption of the directive that these rules were new "to a certain extent." "DoD Presents Procedural Guidelines For Military Commissions," http://www.defenselink.mil/news/Mar2002/n03212002_200203213.html. This is an understatement.

[19] "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.,* 410 U.S. at 302.

There are thus far seven Military Commission Instructions (MCIs) issued April 30, 2003 under MCO-1. The first appears at http://www.defenselink.mil/news/May2003/d20030430 milcominstno1.pdf, and they are consecutively numbered; *e.g.*, ~ no2.pdf, ~no3.pdf, etc. We are primarily concerned with MCI-4 & -5.

A. MCO-1, the MCIs, Assigned Military or Civilian Defense Counsel, and Their Duties

1. Defense counsel in general

MCO-1 provides as to defense counsel in ¶ 4(C):

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) *To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused;* and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate

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> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Accordingly, it is held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)).

Our national view of due process does not apply to these military commissions, even though law; MANUAL FOR COURTS MARTIAL, Preamble ¶ 2(b)(2); and the Geneva Convention and other human rights treaties require it.

> of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). . . .
>
> (b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney:(i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) *has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings*. Civilian attorneys may be prequalified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5). (emphasis added)

The second italicized portion refers to MCI-5, Annex B, *infra*. What the government gives in ¶ 4(C)(2) as to Detailed Defense Counsel it takes away as to civilian defense counsel under ¶ 4(C)(3)(b)(v).

2. Office of Chief Defense Counsel for the Military Commissions

MCI-4 ¶ 3 establishes the Office of Chief Defense Counsel and it delineates its duties in assigning Detailed Defense Counsel. Chief Defense Counsel must insure that the accused is always represented by Detailed Defense Counsel even if civilian counsel also represents an accused. *Id.* ¶ 3(B)(11). Chief Defense Counsel will also monitor counsel to seek to ensure zealous representation but also to ensure that defense counsel do not enter into joint defense agreements that create confidentiality obligations beyond the accused.[20] ***Id.* ¶ 3(B)(10). Moreover, ¶ 3(C)(2) provides:**

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[20] This is ironic because of a lack of confidentiality, discussed *infra*.

2) **Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) [MCO-1] and (b) [Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)]. In this regard, Detailed Defense Counsel *shall: defend the Accused to whom detailed zealously within the bounds of the law* and without regard to personal opinion as to guilt .... (emphasis and bracketed material added)**

Detailed Defense Counsel, however, are in the same position as civilian defense counsel except that they may not be barred from the courtroom, but they cannot discuss with their civilian co-counsel what happened in a "closed session."

3. Civilian Defense Counsel

Civilian Defense Counsel are governed by MCI-5. The burdens on a civilian becoming eligible to serve as defense counsel before a military commission are onerous. To become a defense counsel, civilian lawyers are required to execute an Affidavit and Agreement by Civilian Defense Counsel, MCI-5, Annex B. It provides in pertinent part in ¶ II under "Agreements":

B. I will be well-prepared and will conduct the defense zealously, representing the accused through the military commission process, from inception of my representation through the completion of any post trial proceedings ....

...

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.

I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

J. I agree that I shall reveal to the Chief Defense Counsel and any other

appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).[21]

It should be apparent to all that the purpose of forcing defense counsel to sign this agreement is so violations of the agreement may be prosecuted under 18 U.S.C. § 1001, as happened in the Stewart case. *United States v. Stewart,* 2002 WL 1300059 (S.D.N.Y. 2002),[22] *later opinion United States v. Sattar,* 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of § 1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand). Her co-defendant's case is *United States v. Sattar,* 2002 WL 1836755 (S.D.N.Y. 2002), *later opinion*, 2003 WL 21698266 (S.D.N.Y. July 22, 2003).

B. The Duty of Zealous Representation

The DoD repeatedly tells us that it expects all defense counsel to zealously defend. We have no doubt that defense counsel will do so, in the highest traditions of duty of American criminal defense lawyers and military lawyers. The problem with MCI-4 & -5 is that it makes it impossible for defense counsel to provide a zealous and ethical defense before these military commissions.

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[21] MCI-5 also provides that civilian defense counsel, *inter alia*:

- will not be paid by the U.S. government (*id.* ¶ 3(A)(1))
- must have a SECRET or higher security clearance which they have to pay for (*id.* ¶ 3(A)(2)(d))
- ensure the commission proceedings are counsel's primary duty and no matter in counsel's private practice or personal life can interfere with the commission's proceedings (*id.*)
- once proceedings have begun, counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer (*id.* ¶ II(E)(2))
- will make no public or private statements regarding closed sessions or about classified material (*id.* ¶ II(F))
- agree to abide by all rules and regulations concerning classified material (*id.* ¶ II (G).

[22] Indictment: http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf. The government's theory is that the lawyer made a false affirmation under SAMs to the government that she would not disclose certain things learned from the client. Indictment ¶s 7 (attorney signed affirmations) & 10 (attorney violated SAMs).

We give three examples, two involving military tribunals, of lawyers taking highly unpopular cases:

1. The Boston Massacre Criminal Trial (1770)

The British garrisoned troops in Boston starting in 1768. On March 5, 1770, a lone guard was attacked by a mob (estimated to be between 30-60 men and young men). First came shouting and insults. Then they threw objects. One British soldier standing alone was hit first by snowballs, and then by chunks of ice, coal, rocks, paving stones, and sticks. He called for reenforcements, and other troops came to his aid. Only the troops were armed. When a soldier was hit with a stick, he fired into the crowd, and others did, too. Five died and several were injured. Of course, a furor erupted in Boston. The popular sentiment was immediately obvious: this was murder, and the officer in charge, British Capt. Thomas Preston, had ordered the shooting. Eight soldiers and Capt. Preston were turned over to the Sheriff of Suffolk County, Massachusetts.

On March 6th, a friend of Preston's came to lawyer John Adams's office and asked him to undertake their defense because Preston did not order the shooting. Adams, a busy lawyer at the time, took the case. Before he could get involved, however, an inquest was held, and Preston gave a lengthy deposition. 3 LEGAL PAPERS OF JOHN ADAMS 4 (Butterworth, ed., 1965, Atheneum).

An indictment soon followed in the name of the British government, but the case was pursued in the Superior Court of Suffolk County, Massachusetts, *Rex v. Preston* and *Rex v. Wemms*. *Id.* at 46-47. Adams and Robert Auchmuty, Jr. and Josiah Quicy, lawyers for the soldiers, stalled the trials as long as they could so tempers would cool and a fair trial would be more likely. Seven months later, the case came to trial before a Boston and Suffolk County jury. *Id.* at 48. After a week's testimony (*id.* at 50-86), Adams persuaded the jury that the witnesses that put Preston outside ordering his troops to fire were mistaken or lying—Preston only ordered the troops to stop shooting (*id.* at 86-88), and Preston was acquitted.

The soldiers were tried separately less than three weeks later. At the end of the second trial, six of the soldiers were acquitted, and two were convicted of manslaughter.[23]

Adams's career was not harmed by his taking the case, although he admitted that his practice dropped off for over a year. He went on to become the second President of the United States. Adams's diary account of why he took the case is pertinent to us today:

> **The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death**

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[23] Their trial comprises the balance of *id.* vol. 3.

against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.[24]

2. The Nazi Saboteurs Military Tribunal (1942)

In late June 1942, eight "Nazi Saboteurs" entered the United States in civilian clothing allegedly to engage in, what would be called today, domestic terrorism. One of them turned himself in to the FBI and he gave the locations of the rest. The arrests were all made by June 23d. The one who turned himself in apparently was fleeing Nazi Germany and was using this surreptitious entry as a method of gaining asylum. J. Edgar Hoover of the FBI, however, gave the impression that they made the case and captured the saboteurs by their own investigation and actions for the benefit of Germany so they would think that further such invasions would fail. The government gave the impression to the one who came in that it would give him leniency, but it reneged. All eight were charged with being saboteurs subject to trial before a military commission since they entered the country as spies. On July 2d, President Roosevelt issued his proclamation for a military tribunal, and the rules of procedure for the trial were issued on July 7th. The secret trial began on July 11th.

During the trial, defense counsel sought habeas review in the U.S. District Court for the District of Columbia and certiorari in the U.S. Supreme Court, and the trial had a hiatus while the Supreme Court considered the case on an expedited basis, hearing argument starting the day the briefs were filed and carrying over to a following half day, and it promptly denied relief on July 29th with an opinion following months later. *Ex Parte Quirin*, 317 U.S. 1 (1942). The trial resumed immediately and ended on August 1st with convictions and death sentences for six and life for two. The President reviewed the findings and refused to stop the executions. The six were electrocuted in the D.C. Jail on August 8th: Forty-six days from arrest to execution, including a three week trial. The other were granted clemency to a 10 year sentence in the 1950's.

Military defense counsel assigned to the case were Col. Cassius M. Dowell and Col. Kenneth Royall. Col. Carl L. Ristine was shortly appointed to represent the one who came in first because of an apparent conflict of interest, so Dowell and Royall had the other seven (two were arguably U.S. citizens, but that was found irrelevant). By all accounts of the proceedings, many believe that defense counsel provided zealous representation in the face of a trial that was a foregone conclusion, designed to result in conviction, challenging the constitutionality of the proceedings, futilely seeking a writ of habeas corpus challenging the jurisdiction of a military tribunal, and putting on a full (to the extent allowed by the rules) and zealous defense in a completely secret trial held in Washington in the Department of Justice building. The quality of their representation was not known until years later when the papers of the proceeding were released to the public. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW ch. 3 (Univ. Press of Kansas, 2003).

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[24] Douglas Linder, "The Boston Massacre Trials: An Account," http://www.law.umkc.edu/ faculty/projects/ftrials/bostonmassacre/bostonmassacre.html (2001).

The outcome of the trial was foreordained by Hoover himself, believing that swift trial and execution of the saboteurs would lead the Nazis to believe in the invincibility of the FBI in the saboteurs' capture, but the defense lawyers apparently did all they could for their clients. They did what was expected of American military criminal lawyers and criminal defense lawyers in general: they defended their clients with zeal, creativity, and utmost vigor under undisputably bad circumstances, and they sought civilian review of what they believed was an unconstitutional process. Their reputations as lawyers were not harmed by their zeal, either. After retirement, Col. Royall was appointed Secretary of War by President Truman.

3. The Military Tribunal of General Yamashita (1946)

After the surrender of Japan at the end of World War II, Japanese General Tomoyuki Yamashita was brought before an American military tribunal sitting in the Philippines. He was charged barely three weeks after surrender. He was assigned six American military lawyers to defend him, and only one had extensive trial experience, Capt. Frank Reel. The others proved their mettle [25]

The tribunal was obviously organized to convict General Yamashita because of the gross denials of due process of law visited upon him. Nevertheless, the defense lawyers served heroically, if nothing else, fighting the government every step of the way, seeking to show that General Yamashita could not be held accountable for what was happening all over the Philippines, in light of how the American invasion fragmented his forces and he could not communicate with them. Essentially, he was being held responsible for the actions of troops under his command, even though he was unable to command them at the time of many of the acts they were accused of.

From the Philippines, Capt. Reel dispatched a handwritten[26] petition for writ of habeas corpus to the U.S. Supreme Court, and it was actually heard, but, of course, rejected. *Application of Yamashita*, 327 U.S. 1 (1946). The Supreme Court found the tribunal to be constitutional, but one cannot appreciate what defense counsel and the accused had to endure without reading the dissenting opinions of Justices MURPHY, 327 U.S. at 26-41, and RUTLEDGE, 327 U.S. at 41-81.

Justice MURPHY found that the tribunal violated virtually every tenet of law argued on behalf of the accused Japanese general:

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[25] *See generally* FRANK REEL, THE CASE OF GENERAL YAMASHITA (U. Chi. Press 1949). *Compare* the differing proceedings before the International Tribunal for the Far East (ITFE) where due process actually was accorded, and the results for the individual persons accused were better in T. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIAL (U. Ky. Press 2001).

[26] They had no typewriters or other basic things to conduct such a trial.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish * * * Offenses against the Law of Nations * * *." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . .

***Yamashita,* 327 U.S. at 26-27 (Justice MURPHY dissenting). There were no evidentiary or constitutional protections available to the accused (similar to these commissions).**

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those future [implications]. Indeed, the fate of some future President

> **of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.**

Id. **at 28-29 (bracketed material added).**

Justice RUTLEDGE was less kind to the government. ***Id.*** **at 41-42 (Justice RUTLEDGE dissenting):**

> **More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.**
>
> **. . .**
>
> **With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.**

Justice RUTLEDGE found the military commission to be unconstitutional, (1) in significant part because of the deficiencies in the rules of evidence that allowed ex parte evidence without authentication (*id.* at 48-49 & n. 9; *id.* at 52-53), something shared by today's military commissions, (2) the lack of an opportunity to prepare a defense to defend against 64 specifications, including the government adding 59 more specifications on the day the trial started (*id.* at 56-61); and a denial of a continuance to prepare a defense (*id.* at 60-61); (3) ignoring of the Articles of War (now the UCMJ) for the trial as required by statute (*id.*

at 61-69); (4) ignoring the Geneva Convention of 1929 (*id.* at 72-78); (5) denying application of the due process clause of the Fifth Amendment to Yamashita (*id.* at 78-81).

Justice RUTLEDGE closed as follows:

> **I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.**
>
> **It was a great patriot who said:**
>
> > **"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."[42]**
>
> **42. 2 THE COMPLETE WRITINGS OF THOMAS PAINE (edited by Foner, 1945) 588.**

***Id.* at 81.**

Justice RUTLEDGE thus states our concern today: American soldiers and civilians are at risk of being similarly denied due process as happened in Iraq in 1991; *Acree, supra;* if they are captured because of our example of a trial without minimal due process in violation of our own law and international law.

C. Comparison to Today's Criminal Defense Bar

The kind of defense afforded one accused of crime is an integral part of the American legal tradition, and it is NACDL's mission:

> Ensure justice and due process for persons accused of crime . . .
>
> Foster the integrity, independence and experience of the criminal defense profession . . .
>
> Promote the proper and fair administration of criminal justice.

NACDL Bylaws, Art. II, § 1.

The public and the courts expect criminal defense lawyers to provide a zealous defense to every client, no matter how unpopular that client may be. Representing the unpopular is the job of the criminal defense lawyer, and it is necessary to insure that the rights of all of us are protected and maintained. This has been recognized for hundreds of years. *See* Lord

Brougham's closing argument in 2 TRIAL OF QUEEN CAROLINE 7-8 (1821), quoted in DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973); GEORGE SHARSWOOD, PROFESSIONAL ETHICS 84-84 (1884); *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988); *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (Justice WHITE, concurring and dissenting). It is imbedded in the ethical rules by RPC Rule 1.1 (duty to be competent), Rule 1.3 (duty to be diligent), Rules 1.7-1.10 (duty to be independent), and Rule 2.1 (candid advice). *See also* RPC Rule 1.16(b) (duty to withdraw if counsel cannot zealously defend).

If representation of a particular person is or becomes morally repugnant to the lawyer, or simply impossible under the circumstances; RPC Rule 1.7(a)(2); the lawyer should not take the case or may withdraw in a proper case. RPC Rule 1.16(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32, and Comment (2000); Tenn. Op. 96-F-140. Indeed, a lawyer that cannot give the client his or her all should not be in the case because that creates a personal conflict of interest under Rule 1.7(a)(2). A lawyer's personal conscience or moral code is a valid consideration in determining whether or how to proceed. RPC Preamble ¶ 6. *See also id.* ¶ 14:

> The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Any criminal defense lawyer needs to keep in mind that the government will contend that no law but the MCO and MCIs will apply and that the accused has only the rights the government chooses to give.[27] **Defense counsel may feel it necessary to seek civilian court review, as happened in *Ex Parte Quirin* and *Application of Yamashita* even if counsel believes that the courts will unlikely intervene. The scholars uniformly believe that the President has exceeded his authority as Commander-in-Chief when the War Powers Clause of the Constitution resides that power in the Congress. U.S. Const., Art. I, § 8, cl. 11; *see Youngstown Sheet & Tube, supra.* An independent judiciary may, and should, agree.**[28]

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[27] *See, e.g.*, Mark Hamblett, "Government Argues Jose Padilla Has Few Rights," *New York Law Journal* (July 29, 2003) (http://www.law.com/jsp/article.jsp?id=1058416437338) involving *Padilla v. Rumsfeld* pending in the Second Circuit ("'The laws and customs of war recognize no right of enemy combatants to have access to counsel to challenge their wartime detention,' attorneys for the government said in their brief.").

[28] There is a difficult jurisdictional issue here, too: NACDL believes that Guantanamo Bay, Cuba, was picked for the forum for these military commissions to enable the government to defeat any effort at an accused person obtaining civilian court jurisdiction over him. These

D. ABA's Proposed Recommendation

NACDL also endorses[29] **the American Bar Association's proposed Recommendation from its Task Force on Treatment of Enemy Combatants from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities.**[30] **That recommendation states:**

> **FURTHER RESOLVED,** that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:
>
> 1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client;
>
> 2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;
>
> 3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;
>
> 4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;

"enemy combatants" are not being tried in the place of their alleged crimes as required by the Law of War.

Guantanamo Bay has a unique status as leased land which the government claims foils any civilian court's efforts to assert jurisdiction over the detainees. *See Odah v. United States,* 355 U.S.App.D.C. 189, 321 F.3d 1134 (2003).

[29] This provision was separately unanimously adopted on August 6, 2003, by the NACDL Executive Committee which acts for NACDL between meetings of the Board of Directors.

[30] It is also endorsed by the Association of the Bar of the City of New York and the Beverly Hills Bar Association.

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003).

The U.S. Supreme Court virtually adopted these ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases on June 26, 2003 in *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003).

E. Duties of Defense Counsel in a Military Commission

It appears from the rules under which these commissions will operate that defense counsel will be severely disadvantaged. Defense counsel has no ability to share information with co-defendant's counsel or witnesses to attempt to put on a common defense, defense counsel likely will be limited in counsel's ability to even meet with the client, and attorney-client communications will be monitored.[31]

A military lawyer detailed to take the case likely has no choice to get involved, but the military lawyer should refuse to sign the military version of Annex B,[32] but civilian

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[31] Defense counsel most certainly will need an interpreter to communicate with the client, and the interpreter will likely be provided by the CIA, DIA, or other governmental entity, and the communications *will* be monitored and likely will be recorded. The government insists that the information so obtained will not be used against the accused in that proceeding, and the future crime exception applies. (MCI-5, Annex B, ¶ II(I) & (J) (defense counsel must reveal future crimes likely to result in death or seriously bodily harm or impair national security; *compare* RPC Rule 1.6(b)(2))

Since there is no double jeopardy protection in these military commissions, admissions of the accused to counsel could be used in another trial over the same facts or a related trial.

[32] We take no position on a military lawyer's obligation to refuse to execute what he or

counsel does have a choice to not apply to be counsel.[33]

We also believe that no military or civilian defense lawyer should apply to handle such cases unless qualified to handle death penalty cases in their local jurisdictions or in federal or military courts. These military commission cases must presumptively be considered death penalty cases, but, under the rules of the military commission, counsel and the accused may not learn that the case is being pursued as a death penalty case until the opening statement since there is no fundamental fairness requirement, as in the civilian system, of notice and the pleading of an aggravating circumstance so the accused can prepare for a penalty phase.

It is NACDL's position, by unanimous vote of the Board of Directors having viewed MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the extraordinarily serious and unconscionable risks involved in violating Annex B just by doing what we do everyday,[34] **raising every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the UCMJ, treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.**[35]

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she believes is an unlawful order. *See generally* 10 U.S.C. § 892. We leave it to the individual military defense counsel involved, although NACDL through its Military Law and Ethics Advisory Committees will address specific cases on the request of NACDL members.

[33] Civilian counsel has to be a U.S. citizen under the MCO and MCIs (except for British counsel given special status). If a U.S. lawyer is sought to be retained, the lawyer is cautioned that the Office of Foreign Assets Control operating under the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, will determine that the defense lawyer cannot be paid under the Taliban Sanctions, 31 C.F.R. § 545, and the Global Terrorism Sanctions, 31 C.F.R. § 594. *Compare United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va. 2002) (Lindh's lawyers, however, were not paid with foreign funds).

[34] **We strongly caution, however, that counsel must keep in mind that signing Annex B and then refusing to abide by its terms likely will be treated by the government as a crime under 18 U.S.C. § 1001.** The government has done so as to Special Administrative Measures agreements in the Bureau of Prisons.

[35] By signing Annex B, defense counsel waives the ability to test the constitutionality of

If counsel appearing before a military commission has an ethical quandary that they cannot resolve, they need to consult with their state bars. Military case law has already settled that issue (as noted above), and 28 U.S.C. § 530B and 28 C.F.R. § 77.3 makes all government lawyers subject to regulation by their state bars.[36]

NACDL members can also consult with the Ethics Advisory Committee. NACDL will stand behind its members to insure than they can give their clients the best defense possible.

One final note, if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret—it could lead to counsel being indicted. One can assume that defense counsel's calls to outside counsel from Guantanamo Bay will be monitored, too.[37]

Notice

This is an opinion only of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers, as approved by the NACDL Board of Directors. NACDL is a voluntary association of nearly 11,000 criminal defense attorneys with more than 80 state and local affiliates. This opinion is intended to be the Committee's best interpretation of the Model Rules of Professional Conduct and the rules, statutes, and constitutional provisions involved as they apply to the written facts presented to the Committee, and it is not binding on anyone other than to show the lawyer's good faith in reliance on it.

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the proceedings in a civilian court. Defense counsel cannot waive such a fundamental client right.

[36] While it varies from state-to-state, state bar ethics opinions may be binding on the lawyer seeking the opinion, or they may be merely advisory.

[37] The government then will seek to impose secrecy requirements on counsel that defense counsel consults.

Rick Wilson

From: Hodges, Keith [redacted]

Sent: Friday, December 16, 2005 8:39 AM

To: [redacted]

Subject: Presence of Counsel at sessions in GTMO: US v Khadr

Attachments: PO 1 F - Khadr - Announcement of spedfic Jan 06 session times, 9 Dec 05.pdf; PO 1 - Khadr - Scheduling of first session 2 Dec 05.pdf; PO 1 B - Khadr - CPT Merriam's Response and POs reply, 8 Dec.pdf; PO 1 C - Khadr - Prof Wilson's Response, 8 Dec.pdf; PO 1 D - Khadr - Prof Ahmad's Response, 8 Dec.pdf; PO 1 E - Khadr - Prof Ahmad's email for clarification and PO response, 9 Dec.pdf

This email addresses both LT [redacted] request to be excused from the Jan session in US v. Khadr (see below), and the email traffic concerning Mr. Wilson's attendance or non-attendance during the same session. (See the PO filings attached.)

1. As a general rule and starting point, all counsel who are detailed to a case, selected defense counsel, and civilian counsel on the case must attend all sessions of the Commission.

2. Notwithstanding the general rule above, counsel can be excused from attending a particular session if the client agrees. There are conditions:

a. Because a closed session may be required at any session and that could occur without warning, the detailed defense counsel must attend all sessions.

b. If a counsel is excused by a client, that excusal will not limit the business that is scheduled to be accomplished at the session for which a counsel is to be excused. This means that if the Commission is scheduled to hear motions, for example, the fact a client has excused the appearance of a counsel would not allow a party to defer or avoid litigating a motion because the excused counsel is not present.

c. The Presiding Officer is the one responsible for ensuring the business scheduled for a session is accomplished. If not all counsel on a case will attend the session because the client has excused a counsel, that matter must be brought to the immediate attention of the Presiding Officer, the Assistant, and opposing counsel. This notice is necessary so the Presiding Officer can be assured that business scheduled to be conducted will not be hindered or delayed by a counsel's being excused. This notice can be by email.

d. The notice to the Presiding Officer will contain the following assurances:

(1). In the case of a request to excuse any counsel for the Defense, the request to be excused has been approved by the accused and lead counsel for the Defense. If the counsel to be excused is a prosecutor, the excusal has been approved by the Chief Prosecutor or lead Prosecutor.

(2). The accused and lead counsel for the Defense (or the Chief Prosecutor or lead Prosecutor in the case a prosecutor being excused) and the counsel seeking to be excused, are aware that excusal of

the counsel does not permit delay or deferral of business of the Commission because the counsel is excused, and that another counsel for the Defense (or Prosecution) who will be present can fully address and litigate, if necessary, any business of the Commission.

(3). The request is not for the purposes of seeking delay, and will not in fact delay, Commission proceedings.

3. In the case of the Defense, the notice to the Presiding Officer addressed in paragraph 2 above will also include a document signed by the accused in English (or translated into English if the signed document is in a language other than English) that states:

a. The accused consents to excusal of the counsel, and that the accused understands that the business before the Commission will not be hindered or delayed because the counsel has been excused, and

b. The accused understands that another counsel of the Defense is responsible for ensuring all business of the Commission can be conducted at the session.

Recognizing the difficulties in obtaining documents signed by the accused on potentially short notice, the Presiding Officer will accept assurances of the requestor as to the accused's assurances provided that it is also represented that a member of the Defense team has personally spoken with the accused and that the accused agrees to the assurances.

4. In US v. Khadr, the Presiding Officer is aware that CPT Merriam and Professor Ahmad indicated they would be present at the January session. If that situation changes, the Presiding Officer must be advised immediately. Professor Wilson has indicated he will not be present, but the Presiding Officer is not aware whether Professor Wilson will be representing Mr. Khadr. If the accused requests representation from Professor Wilson - *or any other attorney* - who intends to be absent, the Defense will comply with paragraphs 2 and 3 above.

5. Provided the Prosecution in US v. Khadr can conduct all the business scheduled for the Commission and the other assurances in paragraph 2 above are met and understood, the Presiding Officer has no objection to LT Trivett's being excused from the session.

6. This email will be added to the filings inventory as PO 1 H.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: [redacted]

2/20/2006

Sent: Monday, December 12, 2005 8:48 AM
To: [redacted]
Subject: Request for excusal from week of 9 January sessions in US v Khadr

Mr Hodges,

I respectfully request to be excused by the Presiding Officer from the 9 January session to be held in the case of the United States v Khadr. Although I believe that LT [redacted] informed you on 9 December that only he and Major [redacted] would be representing the United States at this initial session, I had not requested to be formally excused, and remain detailed to the case.

Very Respectfully,

[redacted]
Prosecutor, Office of Military Commissions
Department of Defense
[redacted]

The attached motion was originally entered on the filings inventory as D 2 and ruled upon in D 2 A.

The following email was sent by the Assistant, at the direction of the Presiding Officer, on 23 Feb 2006 concerning this motion:

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1. During the 8-5 Conference of 22 February, the defense indicated they still wanted to address issues raised in D 2. Contrary to the discussion at the 8-5 Conference, that motion was already ruled upon and denied in D 2 A. In ruling on D 2, the PO left the option open for the defense to raise the underlying issue anew should the defense desire to do so. The PO does not want to create confusion in the exhibits previously filed with the Commission, nor does he desire to create unnecessary filings or duplicate effort.

2. Accordingly, the motion previously filed as D 2 has been placed on the filings inventory as D 7 and is attached hereto. For the purposes of the timing of responses and replies, the service date shall be 23 February 2006.

The attached motion is D 7.

Keith Hodges
Assistant

UNITED STATES OF AMERICA	**DEFENSE**
v.	Motion to Abate Proceedings of the Military Commission Due to MCO No. 1's Fatal Inconsistency With the President's Military Order
OMAR AHMED KHADR	**5 January 2006**

1. This Motion is filed by the defense in the case of *United States v. Omar Ahmed Khadr.*

2. **Relief Requested.** The defense requests that the military commission proceedings be abated until such time as competent authority resolves the fatal inconsistencies between the President's Military Order of 13 November 2001 ("PMO") and the Military Commission Orders ("MCO's") and Instructions ("MCI's") that purport to implement it.

3. **Synopsis.** The Military Commission cannot convene in the absence of the Members, and the Presiding Officer cannot rule alone on matters of law, under the President's Military Order. These proceedings must be abated until new implementing regulations can be drafted that conform to the minimum requirements of the current PMO, or until a new PMO is issued which changes these requirements.

The President's Military Order of 13 November 2001 states, in relevant part, that the commission "shall at a minimum provide for . . . a full and fair trial, with *the military commission* sitting as the *triers* of both law and fact." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). In apparent conflict with this very

specific language, military commissions appointed to decide the cases against several detainees, including Omar Ahmed Khadr, [1] have convened or attempted to convene initial sessions during which only the Presiding Officer and parties were to be present. The basis for this action is apparently the revised Military Commission Order Number 1, dated 31 August 2005, which provides for the Presiding Officer to "rule upon all questions of law" and which allows him to preside over sessions in the absence of the other members.

MCO No. 1 and the PMO are thus inconsistent on their face – the MCO allows for an action that the PMO clearly does not contemplate. This inconsistency must be resolved in favor of the PMO, since the MCO's are merely implementing regulations of the PMO. Moreover, MCO No. 1 itself states the proper rule of construction when, at Section 7.B., it states that *"[i]n the event of any inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military Order shall govern."* MCO. No. 1 at § 7.B. (emphasis added).

Only revision of the PMO itself will serve to correct the inconsistency and allow the Presiding Officer of a Military Commission to convene sessions without the other members, and to decide matters of law without the other members. Until the President promulgates a new order that modifies or further delineates the powers of individual members (the Presiding Officer, in this case) of a military commission, this proceeding

[1] Omar Ahmed Khadr was a juvenile at all times during which he is charged with crimes before this Commission. At the first date mentioned in the Charge Sheet prepared by the government (1989, see para. 7, Charge Sheet), Omar Khadr was two years of age. At the time of his capture and all of his alleged crimes, he was fifteen years of age. In communications from this Commission's Assistant to the Presiding Officer, Omar Khadr has been referred to as "Mr. Khadr." It is probably more appropriate to refer to Omar Khadr as "Master Khadr" (reflecting English usage for a male juvenile), by his first name alone, or by his initials, as is the practice in many jurisdictions. Therefore, throughout this motion, when Omar Ahmed Khadr is referred to in shorthand, he will be referred to as "O.K." or "Omar."

must be abated. Alternatively, the Secretary of Defense can promulgate new MCOs that adhere to the requirements laid out in the PMO.

4. **Burden of Proof and Persuasion.** This motion is jurisdictional. Once a jurisdictional challenge is fairly raised, the burden shifts to the prosecution to establish jurisdiction by a preponderance of the evidence. *See United States v. Oliver,* 57 M.J. 170, 172 (C.A.A.F 2002) ("Jurisdiction is an interlocutory issue . . . with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence").

5. **Facts.** This motion is predicated on a purely legal issue; no facts will be argued. However, for purposes of clarity, the defense offers the following facts regarding the PMO:

A. On 13 November 2001, the President of the United States issued a military order acting in his capacity as Commander-In-Chief of the armed forces (the "PMO").

B. The PMO is the source of authority upon which the government bases its power to convene military commissions against detainees held at Guantanamo Bay, Cuba.

C. The PMO has not been changed, rescinded, re-issued, or otherwise replaced as the basis of authority for the Secretary of Defense to promulgate orders and regulations for the conduct of the military commissions.

6. **Argument.**

A. **MCO No. 1 Clearly Violates the PMO**

The PMO is the foundational document upon which the entire current Military Commissions process is built. From that order flow the powers of the Secretary of Defense to detain, and eventually try, members of Al Queda. It is thus critical to read the language and text of the PMO closely in order to evaluate the legality of the regulations, orders, and instructions that purport to implement it.

First, the President makes it clear (in the section of the order dedicated to "Definitions and Policy") that the PMO is the only source of procedure for the Military Commissions; the Secretary is enjoined to ensure that no other procedure for trial be used. Specifically, the President ordered that individuals who are to be tried by military commission be "tried *only* in accordance with Section 4." PMO at § 2(b), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added).

Section 4 then proceeds to define the authority of the Secretary of Defense regarding these trials. The Secretary is directed to promulgate orders and regulations which provide for "a full and fair trial, with *the military commission* sitting as the *triers* of both fact and law." PMO at § 4(c), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001) (emphasis added). The language chosen – corporate in the first instance and plural in the second – has only one clear meaning: that the body or tribunal composed of *both* the Presiding Officer and the Members shall convene to try both law and fact.

Contrasted to the clear language of the PMO is the revised language of MCO No.1, which (as currently drafted) authorizes the Presiding Officer to convene sessions in

the absence of the other members, and to rule on matters of law. Indeed, MCO No. 1 may very well have been rescinded and re-issued precisely to address the inconsistency at issue here (if so, it has obviously failed to do so). On 21 March 2002, the Secretary of Defense issued the original Department of Defense Military Commission Order Number 1. That order specified, in Section 4.A.(5), the duties of the Presiding Officer. None of these included a specific duty or power to rule alone on matters of law. On 31 August 2005, the Secretary of Defense rescinded the original Military Commission Order Number 1 and issued a new Order by the same name. This is the Military Commission Order Number 1 currently in effect. The current version of MCO No. 1 has been amended to specifically include, at Section 4.A.(5)(a), the power of the Presiding Officer to "rule upon all questions of law" and to "conduct hearings . . . outside the presence of the other members for purposes of hearing and determining motions, objections, pleas, or other such matters as will promote a fair and expeditious trial." MCO No. 1 at § 4.A.(5)(a).

Thus, the PMO and MCO No. 1 are clearly at odds. The PMO requires a full and fair trial, with *the military commission* sitting as *triers* of law and fact. MCO No. 1, on the other hand, allows for the Presiding Officer to conduct hearings in the absence of the other members and to rule on questions of law. The defense believes that the PMO does not allow the Presiding Officer to do either of these things – by the terms of the PMO, only the full commission can sit, and the members of the commission (including the Presiding Officer, who is included in the definition of "members", see MCO No. 1 at § 4.A.(5)(a)) must be the triers of both law and fact.

B. **Ordinary Principles of Statutory Construction Resolve this Conflict in Favor of the PMO.**

This, then, reduces the question to one of "construction." The first rule of legal construction has always been to accept the plain meaning of the text at issue. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004), *quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (1989) ("It is well established that 'when the . . . language is plain, the sole function of the courts . . . is to enforce it according to its terms.'"). The language of the PMO is plain – "the commission" (one corporate body) shall sit as "the triers" (plural, indicating more than simply the Presiding Officer) of law and fact.

The government may suggest that the defense places too much emphasis or weight on the President's choice of words when drafting the PMO, and urge this Commission to overlook or ignore the plain meaning of this language. Again, this is not what the law of statutory construction says we are to do. "It is a cardinal principle of statutory construction that a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001), *quoting Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). In *Duncan*, the Court was reviewing the meaning and construction of the word "State" in a federal habeas corpus statute, and the Court noted that strict statutory construction was especially important when "the term occupies so pivotal a place in the statutory scheme as does the word 'State' in the federal habeas statute." *Id.*, at 174. The analogy between that case and this one is clear – the subject matter of the PMO is almost exclusively the establishment of

military commissions to try alleged members of Al Queda – there can be no more "pivotal" word in the PMO than the word "commission."

Thus, by all the ordinary rules of statutory construction, the Presiding Officer cannot convene a session of the commission without the other members, and cannot rule alone on matters of law. This is the conclusion reached by the Presiding Officer in *United States v. David Hicks*, Colonel Peter Brownback, who stated that "*the President* has decided that *the commission* will decide all questions of law and fact. You are not bound to accept the laws as given to you by me." *United States v. David Hicks*, ROT at 114, available at http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf (emphasis added). Colonel Brownback did not cite to MCO No. 1 or to any ruling or order of the Secretary of Defense or the Appointing Authority – he cited, correctly, to the President.

This is also the conclusion reached by the Legal Advisor to the Appointing Authority, who stated in a formal opinion that "[t]he PMO identifies *only one instance* in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission." Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages) (emphasis added). Again, he refers (quite properly) to the PMO as the controlling source of authority. The Legal Advisor (Brigadier General Hemingway) eloquently stated the plain meaning of the PMO: "The 'Commission' is a body, not a proceeding, in and of itself. Each Military Commission, comprised of

members, *collectively* has jurisdiction over violations of the laws of war and all other offenses triable by military commission." *Id.* (emphasis added).

As if there were any further doubt, the newly-reissued MCO No. 1 contains clear guidance on how to resolve inconsistencies between it and the PMO: "[i]n the event of *any* inconsistency between the President's Military Order and this Order . . . the provisions of the President's Military Order shall govern." MCO. No. 1 at § 7.B. (emphasis added). The Secretary appears to have contemplated the possibility that the MCO could be in-artfully drafted to be inconsistent with the PMO, or that the PMO could be wrongly interpreted, and has provided us guidance on what to do in that event: defer to the PMO. This same guidance is contained in every single Military Commissions Order issued by the Secretary of Defense.

C. **Military Commission Proceedings Cannot Occur Until Either the PMO or MCO No. 1 is Amended**

Since MCO No. 1 violates the PMO and is therefore invalid, the proceedings of this Military Commission must be abated until such time as the PMO is amended or the MCO is re-drafted to bring it into compliance with the PMO. It is not possible to continue these proceedings without applicable orders, because the PMO has made it mandatory for the Secretary of Defense to issue such orders. "[T]he Secretary of Defense *shall* issue such orders and regulations . . . as may be necessary [for the conduct of Military Commissions in compliance with the PMO]." PMO at § 4 (b) (emphasis added). It does not say that the Secretary "may" issue such orders – the Secretary "shall" so do.

This, then, leaves the Executive Branch with a choice to make. On the one hand, the Secretary of Defense can promulgate a new Military Commission Order Number 1, which requires the entire Commission (Presiding Officer and other Members) to convene for each session, and which allows for the entire Commission (Presiding Officer and other Members) to sit as the triers of law and fact. In other words, MCO. No. 1 can be drafted such that it is fully consistent with the plain language and clear meaning of the PMO. On the other hand, the President can re-issue or amend his Presidential Military Order, and expressly authorize the Presiding Officer to convene sessions in the absence of other members, to rule on matters of law, and otherwise to perform functions similar to those of a judge in a civil or military court. Either of these would serve to cure the fatal inconsistency between the current PMO and MCO No. 1.

A third choice exists, of course – if the President or Secretary are intent upon ensuring that alleged Al Queda members are tried in some forum which includes a judge, then these detainees can be tried by court-martial pursuant to Article 18 of the UCMJ, or in Federal District Court. Either of those forums would include a judge sitting as the sole trier of law, and would allow for him to convene preliminary sessions and hold hearings in the absence of jurors or panel members. However, as long as the current PMO is in effect, Presiding Officers are decidedly *not* judges. There is nothing in the PMO to suggest that they should be given the powers of judges, and until that changes, Presiding Officers cannot convene sessions without the other Members, nor can they rule on matters of law. The defense objects to any characterization that the Presiding Officer is a judge.

7. **Oral Argument** is requested.

8. **Witnesses and Evidence.** Attachments A and B, listed below.

9. **Reservation.** O.K. is making this motion before the very forum that he contests as illegitimate: a Military Commission composed only of a Presiding Officer, in the absence of the other members, who is exercising his perceived power to rule on matters of law. O.K. does so only because there is currently no other forum before which to make this motion. By so doing, he does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to try him. Other Presiding Officers sitting over military commissions have received similar motions, and O.K. does not believe that making this motion constitutes consent to be tried in this forum.

10. **Attachments.** The following documents are attached and electronically merged into this motion:

A. *United States v. Hicks* Record of Trial at 114, available at http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf (in the Commissions Library)

B. Legal Advisor to the Appointing Authority for Military Commissions, Memorandum for the Presiding Officer, SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions (August 11, 2004) (2 pages).

By: _____

JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

MUNEER I. AHMAD
Associate Professor of Law
American University Washington College of Law
[redacted]
Civilian Defense Counsel for Omar Ahmed Khadr

P (LtCol [redacted] No, sir.

PO: Okay. Members, I have been appointed as the presiding officer. On Monday you got all the commission orders, the directives, the instructions, except for MCI Number 8. Those instructions and references apply to all the cases in which you may be a commission member. I am charged with certain duties. I preside over the commission proceeding during open and closed sessions. As the only lawyer appointed to the commission, I will instruct you on the law.

However, the President has decided that the commission will decide all questions of law and fact. You are not bound to accept the laws as given to you by me. You can accept the law as argued to you by counsel, whether by briefs, or in motions, or attachments. It is also given to you by me in instructions. If you have questions on the law when we are sitting in the commission hearing, you may ask counsel questions about whatever it is they are arguing.

We are not going to discuss the cases with anyone including ourselves, including recesses or adjournments. When we are meeting in closed conference, then we will discuss it. We will only consider evidence properly admitted before the commission. You are not going to consider any other accounts or anything you may have learned in a past life.

You may not discuss the proceedings of this commission with anyone who is not a member of the panel. If anyone attempts to do it, tell them to stop, notify me; and I will make sure appropriate action is taken. When we are closed to deliberate, we alone will be present. Each of us has an equal voice and vote in deciding and discussing all issues submitted to us. As presiding officer, I will preside over the closed conference deliberations and I will speak for the commission in announcing results.

Outside influence from superiors in the governmental chain will not be tolerated. If anyone tries to influence you in any way, notify me immediately and appropriate action will be taken. No one in your chain, or in any other chain, can reprimand you or do anything to you for your actions on this commission. Some of you may serve as members, or alternate member, on more than

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

August 11, 2004

MEMORANDUM FOR Presiding Officer, Colonel Peter Brownback

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. *See Section 4(c)(2).* The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. *See Section 4(c)(3).*

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. 1 delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

- MCO No. 1, Section 4(A)(1) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."

- MCO No. 1, Section 4(A)(1) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate

[redacted]

[redacted]

members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

- MCO No. 1, Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.

- MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.

Thomas L. Hemingway
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing Authority
for Military Commissions

cc: Chief Defense Counsel
Chief Prosecutor

[redacted]

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Thursday, February 23, 2006 4:58 PM
To: [redacted]
Subject: PO 1 O: Khadr - Revised Schedule
Attachments: PO 1 O - Khadr - Revised Trial Schedule (23 Feb 06).doc

The attached filing (PO 1 O) reflects the 8-5 conference held on 22 Feb 06 among counsel and the PO.

<<PO 1 O - Khadr - Revised Trial Schedule (23 Feb 06).doc>>

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

Trial Schedule, 23 Feb 06
United States v. Khadr
PO 1 O (Superseding like entries in PO 1 series)
Blank entries to be resolved later

#	Event	Date	Notes
1.	"Law" Motions: *Motion*[1]	8 Mar 06	POM 4-3
2.	"Law" Motions: *Response*	16 Mar 06	POM 4-3
3.	"Law" Motions: *Reply*	23 Mar 06	POM 4-3
4.	Witness requests on law motions	16 Mar 06	POM 10-2
5.	Session (without members) • Choice of counsel (CDC) • Voir dire of PO • Pleas (already reserved) • Litigate Law motions • Discovery Order litigation	3 April Trial Term	
6.	Evidentiary motions: *Motion*	28 Apr 06	POM 4-3
7.	Evidentiary motions: *Response*	5 May 06	POM 4-3
8.	Evidentiary motions: *Reply*	12 May 06	POM 4-3
9.	Witness requests on evidentiary motions	5 May 06	POM 10-2
10.	Litigate evidentiary motions and remaining law motions.	5 Jun trial term	
11.	Voir dire of members		
12.	Witness requests – merits and sentencing		
13.	Prosecution case in chief - *Merits*		Indicate estimated length of case
14.	Defense case in chief - *Merits*		Indicate estimated length of case
15.	Prosecution – *Sentencing*		Indicate estimated length of case
16.	Defense - *Sentencing*		Indicate estimated length of case
17.	Directed briefs [2]		
18.	Requests to take conclusive notice	As soon as need is identified	POM 6-2

[1] A "law motion" is any motions except that to suppress evidence or address another evidentiary matter.

[2] Dates will be established in the directed brief if directed briefs are used.

Index of Current POMs – February 16, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

UNITED STATES OF AMERICA	**PO 2 A**
	Modification to PO 2, (Discovery Order)
v.	
	28 Feb 06
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	

1. This filing modifies PO 2 (Discovery Order). The terms "date this order is issued" and "the date of this order" shall be the date of PO 2 (19 Dec 05).

2. If either party objects to this modification, they shall file a motion in accordance with POM 4-3 not later than 7 March 2006.

3. It is noted that:

a. The Prosecution previously requested, and was granted, a delay until 1 Mar 06 to complete discovery on some items.

b. The Defense filed D 6. This modification does not affect the viability of that motion with respect to the original Discovery Order PO 2, and D 6 shall be considered with respect generally to this modification. However, if there are any objections to the specifics in this modification, then counsel shall comply with paragraph 2 above.

4. Change paragraph 3 to read as follows.

3. All disclosures required by this Order are continuing in nature.

a. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists.

b. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.

c. If a party is unable to complete its discovery obligations within the time provided, it shall complete that discovery that it can and request a delay for only those matters yet to be provided.

5. Add the following to the end of paragraph 10:

a. If a matter is in electronic form, it shall be provided in the same electronic form unless reasons – stated and justified when the matter is provided – dictates otherwise such as a proprietary program unavailable to the parties, security reasons, or otherwise.

b. Electronic "searchability" of documents.

(1) Because it is not possible to create a 100% accurate, text-searchable document using Optical Character Recognition (OCR) or other software, no party guarantees a text search in an electronic document will be 100% accurate. While providing documents and other evidence in electronic form is preferred and text-searching is a useful technology, it is not a substitute for reading or viewing the document itself.

(2) Matters shall be considered to have been disclosed pursuant to this Discovery Order when the matters or documents provided are viewable by sight either as displayed on a computer monitor, printed, or in other hard copy form regardless of whether a text search reveals the information.

(3) A party shall not, however, convert a text-searchable or OCR'd document before serving on the opposing party to prevent the opposing party from using text-searching software or tools.

6. Change paragraph 12 c to read:

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify.

(1) A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed so as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions.

(2) If a statement or report that has been provided to the opposing party contains a complete synopsis of what the witness will testify to, the statement or report is identifiable by bate stamp number or otherwise, and the location of the report or statement is reasonably described, no further synopsis is required provided that the witness list refers to the statement or report as containing the synopsis. If there is a statement or report that contains a portion of the synopsis of the witness' testimony, a

party need only identify the statement or report as described above and provide a synopsis of any additional matters about which the witness will testify.

7. Add the following to the end of paragraph 14.

The Prosecution may request a delay in complying with this order by either filing a motion or special request for relief with the Presiding Officer in accordance with POM 4-3.

8. Add the following to the end of paragraph 15.

The Defense may request a delay in complying with this order by either filing a motion or special request for relief with the Presiding Officer in accordance with POM 4-3.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

This and the remaining pages show changes to the PO 2 after applying PO 2 A.

UNITED STATES OF AMERICA	)	**DISCOVERY ORDER (PO 2)**
v.	)	**19 Dec 2005** **AS MODIFIED BY PO 2 A**
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	)	**DATED 27 FEB 06**

1. The Presiding Officer finds that to ensure a full and fair trial, the following ORDER is necessary. All correspondence to the Presiding Officer concerning this Discovery Order shall reference the filings designation, PO 2. (See POM 12-1 concerning filings designations.)

2. This Order does not relieve any party of any duty to disclose those matters that Commission Law requires to be disclosed. Where this Order requires disclosure at times earlier or later than Commission Law provides or requires, the Presiding Officer has determined that such earlier or later disclosure is necessary for a full and fair trial.

3. All disclosures required by this Order are continuing in nature.

a. The times set forth below apply to any matter known to exist, or reasonably believed to exist, on the date this Order is issued. If any matter required to be disclosed by this order is not known to exist on the date this Order is issued, but later becomes known, the party with the responsibility to disclose it under this Order will disclose it as soon as practicable, but not later than three duty days from learning that the matter exists.

b. In those cases when any matter required to be disclosed by this Order, becomes known after the date of this Order, but the party is unable to obtain or produce it as required, the party shall give written (email) notice to opposing counsel within three duty days, said notice including a description of the nature of the item or matter and the date and time when it will be produced or disclosed.

c. If a party is unable to complete its discovery obligations within the time provided, it shall complete that discovery that it can and request a delay for only those matters yet to be provided.

4. Any matter that has been provided or disclosed to opposing counsel prior to the entry of this Order need not be provided again if only to comply with this Order.

5. Providing a list of witness names in compliance with this discovery Order does not constitute a witness request. Witness requests must be made in accordance with POM #10-2.

6. Neither the Presiding Officer nor the Assistant shall be provided with a copy of the items ordered to be produced or disclosed by this Order. If counsel believe there has not been adequate compliance with this Order, counsel shall seek relief using the procedures in POM 4-3 or POM 7-1, as appropriate.

7. Objections to the wording of this Order, or the authority to issue this Order.

a. If counsel need the requirements of this discovery Order clarified, the Presiding Officer will be available during the Jan 2006 trial term to discuss the matter.

b. Counsel who object to the requirements of this discovery Order, the Presiding Officer's authority to issue a discovery order, or who seek any relief from the requirements of this Order shall file a motion in accordance with POM 4-3 NLT 31 Jan 2006.

8. Failure to disclose a matter as required by this Order may result in the imposition of those sanctions which the Presiding Officer determines are necessary to enforce this Order or to otherwise ensure a full and fair trial.

9. If any matter that this Order, or Commission Law, requires to be disclosed was in its original state in a language other than English, and the party making the disclosure has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also disclose a copy of the English translation along with a copy of the original untranslated document, recording, or other media in which the item was created, recorded, or produced.

10. Each of the disclosure requirements of this Order shall be interpreted as a requirement to provide to opposing counsel a duplicate of the original of any matter to be disclosed. Transmittal of a matter to opposing counsel electronically satisfies the disclosure requirements herein and is the preferred method of production. When disclosure of any matter is impracticable or prohibited because of the nature of the item (a physical object, for example), or because it is protected or classified, the disclosing party shall permit the opposing counsel to inspect the item in lieu of providing it.

a. If a matter is in electronic form, it shall be provided in the same electronic form unless reasons – stated and justified when the matter is provided – dictates otherwise such as a proprietary program unavailable to the parties, security reasons, or otherwise.

b. Electronic "searchability" of documents.

(1) Because it is not possible to create a 100% accurate, text-searchable document using Optical Character Recognition (OCR) or other software, no party guarantees a text search in an electronic document will be 100% accurate. While providing documents and other evidence in electronic form is preferred and text-searching is a useful technology, it is not a substitute for reading or viewing the document itself.

(2) Matters shall be considered to have been disclosed pursuant to this Discovery Order when the matters or documents provided are viewable by sight either as displayed on a computer monitor, printed, or in other hard copy form regardless of whether a text search reveals the information.

(3) A party shall not, however, convert a text-searchable or OCR'd document before serving on the opposing party to prevent the opposing party from using text-seraching software or tools.

11. A party has not complied with this Order until that party has disclosed to detailed counsel for the opposing party - or another counsel lawfully designated by the detailed counsel - the matter required to be disclosed or provided.

12. Definitions:

a. "At trial." As used in this order, the term "at trial" means during the proponent party's case in chief (and not rebuttal or redirect), whether on merits or during sentencing. Matters to be disclosed which relate solely to sentencing will be so identified.

b. "Exculpatory evidence" includes any evidence that tends to negate the guilt of the accused, or mitigates any offense with which the accused is charged, or is favorable and material to either guilt or to punishment.

c. "Synopsis of a witness' testimony" is that which the requesting counsel has a good faith basis to believe the witness will say, if called to testify.

(1) A synopsis shall be prepared as though the witness were speaking (first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter offered. *See* Enclosure 1, POM 10-2, for some suggestions.

(2) If a statement or report that has been provided to the opposing party contains a complete synopsis of what the witness will testify to, the statement or report is identifiable by bate stamp number or otherwise, and the location of the report or statement is reasonably described, no further synopsis is required provided that the witness list refers to the statement or report as containing the synopsis. If there is a statement or report that contains a portion of the synopsis of the witness' testimony, a party need only identify the statement or report as described above and provide a synopsis of any additional matters about which the witness will testify.

d. "Disclosure" as used in this Order is synonymous with "production."

e. "Matter" includes any matters whatsoever that is required to be produced under the terms of this Order, whether tangible or intangible, including but not limited to, physical objects, documents, audio, video or other recordings in any media, electronic data, studies, reports, or transcripts of testimony, whether from depositions, former commission hearings, or other sworn testimony.

13. Nothing in this Order shall be interpreted to require the disclosure of attorney work product to include notes, memoranda, or similar working papers prepared by counsel or counsel's trial assistants.

14. The Prosecution shall provide to the Defense the items listed below not later 31 Jan 2006. The items shall be provided to the detailed defense counsel unless the detailed defense counsel designates another lawful recipient of the items. The Prosecution may request a delay in complying with this order by either filing a motion or special request for relief with the Presiding Officer in accordance with POM 4-3.

a. Evidence and copies of all information the prosecution intends to offer at trial.

b. The names and contact information of all witnesses the prosecution intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the prosecution intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Exculpatory evidence known to the prosecution.

e. Statements of the accused in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, that:

(1) The prosecution intends to offer at trial whether signed, recorded, written, sworn, unsworn, or oral, and without regard to whom the statement was made.

(2) Are relevant to any offense charged, and were sworn to, written or signed by the accused, whether or not to be offered at trial.

(3) Are relevant to any offense charged, and were made by the accused to a person the accused knew to be a law enforcement officer of the United States, whether or not to be offered at trial.

f. Prior statements of witnesses the prosecution intends to call at trial, in the possession or control of the Office of the Chief Prosecutor, or known by the Office of the Chief Prosecutor to exist, and relevant to the issues about which the witness is to testify that were:

(1) Sworn to, written or signed by, the witness.

(2) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

15. The Defense shall provide to the detailed Prosecution the items listed below not later than 28 Feb 2006. The items shall be provided to the detailed prosecutor unless the detailed prosecutor designates another lawful recipient of the items. These provisions shall not require the defense to disclose any statement made by the accused, or to provide notice whether the accused shall be called as a witness. The Defense may request a delay in complying with this order by either filing a motion or special request for relief with the Presiding Officer in accordance with POM 4-3.

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1) Sworn to, written or signed by, the witness.

(2) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

16. When Alternatives to Live Testimony Will Be Offered by a Party.

a. The testimony of a witness may be offered by calling the person to appear as a witness before the Commission (live testimony) or by using alternatives to live testimony.

b. Whenever this Order requires a party to disclose the names of witnesses to be called, a party which intends to offer an alternative to live testimony shall provide the notice below to the opposing party:

(1) Intent to use alternatives to live testimony rather than calling the witness.

(2) The method of presenting the alternative to live testimony the party intends to use. (*See* paragraph 3c(6)(a-g), POM 10-2, for examples),

(3) The dates, locations, and circumstances - and the persons present - when the alternative was created, and

(4) The reason(s) why the alternative will be sought to be used rather than production of live testimony.

17. Objections to Alternatives to Live Testimony. If, after receiving a notice required by paragraph 16 above, the party receiving the notice wishes to prevent opposing counsel from using the proposed alternative to live testimony, the receiving party shall file a motion under the provisions of POM# 4-3. Such motion shall be filed within 5 days of disclosure of the intent to offer an alternative to live testimony, or the receiving party shall be deemed to have waived any objection to the use of an alternative to live testimony.

18. Obtaining or Creating Alternatives to Live Testimony - Notice and Opportunity to Attend and Participate.

a. Under Commission Law, confrontation of persons offering information to be considered by the Commission is not mandatory, nor is there a requirement for both parties to participate in obtaining or creating alternatives to live testimony. Further, there is no general rule against hearsay.

b. As a result, parties must afford opposing counsel sufficient notice and opportunity to attend witness interviews when such interviews are intended to preserve testimony for actual presentation to the Presiding Officer or other members of the Commission.

c. Failure to provide such notice as is practical may be considered - at the discretion of the Presiding Officer (or in a paragraph 6D(1), MCO# 1 determination , by the other Commission members) - along with other factors, on the issue of admissibility of the proffered testimony.

IT IS SO ORDERED:

/s/
R.S. CHESTER
Colonel, U.S.M.C.
Presiding Officer

UNITED STATES OF AMERICA	**D 6 KHADR**
	PROSECUTION RESPONSE
v.	To Defense Objection to Presiding Officer's Discovery Order and Request for the Commission to adopt the Discovery Rules and Procedure Under Courts-Martial Practice
OMAR AHMED KHADR	**28 February 2006**

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview.

a. The Defense objects to the Presiding Officer's Discovery Order of 19 December 2005 and requests this Commission adopt the discovery rules and procedures and all relevant case law precedent applicable to trials by courts-martial. The Defense argues that the military commission process is governed by the principles of the Due Process Clause of the Constitution, and maintains that adoption of the discovery rules, procedures, and applicable case law precedent utilized in courts-martial are essential to the accused receiving a full and fair trial in accordance with his rights under the Due Process Clause.

b. The Presiding Officer should reject the Defense's request to adopt the discovery rules, procedures and case law precedent applicable to trials by courts-martial for ordinary criminal offenses. First, the accused does not enjoy any Constitutional right to Due Process under the Fifth Amendment. As such, the Constitution does not require the adoption of rules and precedent applicable to trials by courts-martial. Second, the President's constitutional war powers, the AUMF, and Article 36, UCMJ, grant the President the authority to prescribe the pre-trial, trial, and post-trial rules governing military commissions. Exercising his authority, the President determined that the discovery rules and procedures which govern trials by courts-martial shall not be used when trying alien enemy combatants for offenses cognizable under the law of war at military commissions. Thus, the Presiding Officer should find this motion lacks any merit.

4. Facts.

a. *"When lawless wretches become so impudent and powerful as not to be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked."*[1]

[1] Honorable James Speed, Attorney General, 11 Op. Atty Gen. 297 (1865)(emphasis added).

b. On September 11, 2001, "lawless wretches" known as members of the al Qaida terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of more than 3000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.

c. One week later in response to these "acts of treacherous violence," Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2]

d. Subsequent to the AUMF, the President issued a Military Order, where, among other things, he found, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[3] Expressly relying on his authority as Commander-in-Chief under the Constitution, the AUMF, and Articles 21 and 36, Uniform Code of Military Justice, the President directed, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed...."[4] In establishing military tribunals to adjudicate individuals alleged to have committed offenses under the law of war, the President, among others, made this specific determination:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, ***I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.*** (Emphasis added).[5]

The President further directed the Secretary of Defense, "as a military function," to "issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out..." the President's direction for military commissions.[6]

e. In Military Commission Order No. 1 and subsequent orders and instructions issued under his authority, the Secretary of Defense established procedures for the appointment of military commissions and set forth various rules governing the structure, composition,

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[2] Authorization for Use of Military Force, 115 Stat. 224 (hereinafter AUMF).
[3] President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(hereinafter PMO).
[4] 66 Fed. Reg. 57833; *see also* at § 4(a); Article 21 and 36, UCMJ (10 U.S.C. §§ 821 and 836).
[5] PMO, § 1(f).
[6] *Id.* at § 4(b).

jurisdiction, and procedures for military commissions appointed under the PMO.[7] Specifically, regarding discovery, MCO 1 requires:

> The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the accused.[8]

f. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan and paid numerous visits to Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and at times personally met many senior al Qaida leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaida training camps and guest houses.

g. After al Qaida's terrorist attacks on September 11, 2001, the accused received training from al Qaida on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. The accused then conducted surveillance and reconnaissance against U.S. military forces and convoys at an airport near Khost, Afghanistan. He then received one month of training on landmines and soon thereafter joined a group of al Qaida operatives and converted landmines into improvised explosive devices (IEDs) capable of remote detonation. The accused and other al Qaida operatives then buried these IEDs in the ground at areas they knew, based on prior surveillance and reconnaissance, U.S. troops would be traversing.

h. On or about July 27, 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. As U.S. forces approached the compound, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. Toward the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. American forces then shot and wounded the accused, and after his capture, American medics gave the accused life saving medical treatment.

i. In accordance with his PMO, the President designated the accused in this case for trial by military commission on 30 July 2005. On 4 November 2005 the Appointing Authority approved the charges against the accused, and subsequently referred them to this Military Commission for trial in accordance with the PMO and the implementing directives, orders and instructions.

5. Legal Authority.

a. President's Military Order of November 13, 2001, 66 Fed. Reg. 57833.
b. Manual for Courts-Martial (2002).
c. Military Commission Order No. 1 (Aug. 31, 2005).
d. Department of Defense Directive 5105.70 (Feb. 10, 2004).
e. Military Commission Order No. 5 (Mar. 15, 2004).

[7] Military Commission Order No. 1 (Aug. 31, 2005)(hereinafter MCO 1).
[8] MCO 1, ¶5(E).

f. *Duncan v. Louisiana*, 391 U.S. 145 (1968).
g. Ex Parte Quirin, 317 U.S. 1 (1942).
h. Ex Parte Vallandigham, 68 U.S. 243 (1863).
i. *Yamashita v. Styler*, 327 U.S. 1, 8 (1946).
j. Johnson v. Eisentrager, 339 U.S. 763 (1950).
k. Lewis v. United States, 518 U.S. 322 (1996).
l. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
m. Middendorf v. Henry, 425 U.S. 25 (1976).
n. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
o. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).
p. Reid v. Covert, 354 U.S. 1 (1957).
q. Kinsella v. Singleton, 361 U.S. 234 (1960).
r. Grisham v. Hagan, 361 U.S. 278 (1960).
s. McElroy v. Guagliardo, 361 U.S. 281 (1960).
t. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
u. THE LIEBER CODE OF 1863.
v. The Modac Indian Prisoners, 14 Op. Atty Gen. 249 (1873).
w. Military Commissions, 11 Op. Atty Gen. 297 (1865).

6. Discussion

a. The Due Process Clause Of The Constitution Does Not Apply To Alien Enemy Combatants Being Tried Before A Military Commission For Offenses Arising Under The Law Of War.

(1) The Defense begins its motion arguing that the military commission process is bound by the constraints of the Due Process Clause found in the Fifth Amendment of the Bill of Rights in the Constitution. The Defense, however, fails to cite to any authority that holds the Due Process Clause is applicable to the military commission of an alien enemy combatant for offenses arising under the law of war. Conversely, there is a plethora of authority holding that constitutional guarantees under the Bill of Rights are not applicable to military commissions and historical practice and perception since the time the Constitution was drafted establish that there was an understanding that offenses cognizable under the laws of war were distinct, different, and treated separately from regular criminal offenses under the civil law. Military commissions or tribunals for violations of the law of war were not considered courts under Article III of the Constitution and since offenses cognizable under the law of war were not considered criminal offenses as contemplated by the Constitution, the protections afforded in Article III and the Fifth and Sixth Amendments did not apply to trials by military commissions. Furthermore, historical practice and precedent establish that an alien enemy combatant who has never lawfully entered or resided in this country cannot avail themselves to the protections in the Constitution or the Bill of Rights.

(2) In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court held that a United States citizen detained in the United States as an enemy combatant has a due process right to "a meaningful opportunity to contest the factual basis for that detention before a neutral

decisionmaker." [9] While it might follow that the Due Process Clause would apply to a military commission of a U.S. citizen for violations under the law of war, application of the Due Process Clause to an alien enemy combatant who has no lawful connection to the United States clearly does not follow from the *Hamdi* decision.

(3) Historically, it was understood that the Due Process Clause did not apply to military commissions convened to try any person for offenses cognizable under the laws of war.

> That portion of the Constitution which declares that "no person shall be deprived of his life, liberty, or property without due process of law," has such direct reference to, and connection with, trials for *crime* or *criminal* prosecutions that comment upon it would seem to be unnecessary. ***Trials for offences against the laws of war are not embraced or intended to be embraced in those provisions.*** (Bold and italics emphasis added, plain italics emphasis in original.).

Military Commissions, 11 Op. Atty Gen. 297 (1865). Since the time of our Country's founding, it was understood that offenses under the law of war were separate, distinct, and unlike criminal offenses against the civil law, which fell under the protections of the Constitution. Trials of alien enemy combatants for violations under the law of war were by military tribunals that did not employ the same procedures used by the civilian criminal courts, developed through the civilian common law and subsequently enshrined in the Constitution. *See e.g. Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942)(holding protections in the Fifth and Sixth Amendments not applicable in military commissions adjudicating violations under the law of war); *Ex Parte Vallandigham*, 68 U.S. 243, 251, 253 (1863) (stating military commission is not a court within the meaning of the Judiciary Act of 1789 nor is the authority exercised by a commission "judicial in that sense"); *Yamashita v. Styler*, 327 U.S. 1, 8 (1946) (citing *Vallandigham* and stating, "In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court."); *Cf. Middendorf v. Henry*, 425 U.S. 25, 49-50 (1976) (Powell, J., concurring) ("Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers. The procedures in such courts were never deemed analogous to, or required to conform with, procedures in civilian courts."). "Many of the *offences* against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not *crimes*." Military Commissions, 11 Op. Atty Gen. 297 (1865) (emphasis in original).

(4) In *Quirin*, the Supreme Court held that a military commission had the jurisdiction and authority to try and sentence to death eight German saboteurs, one of whom was an American citizen, without the protections afforded in Article III and the Fifth and Sixth Amendments to the Constitution.[10] Resting its decision on the long-established practice in military common law extending back to this country's founding, the High Court said,

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[9] Hamdi at 2635.
[10] *Quirin*, 317 U.S. at 19, 45.

> In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the laws of war not triable by jury at common law be tried only in the civil courts.[11]

Likewise, in *Yamashita,* the Supreme Court upheld the conviction and sentence to death of a Japanese General by military commission notwithstanding the fact that the procedure of the commission permitted the admission into evidence depositions, affidavits, hearsay, and opinion evidence, and directed that the commission panel should admit and consider evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man...."[12] There, the High Court held that the benefits afforded by the Articles of War to trials by courts-martial were not applicable to the military commission because the commission "was not convened by virtue of the Articles of War, but pursuant to the common law of war."[13] The Court concluded that the Articles left control over the procedures in military commissions "where it had previously been, with the military command," and expressly declined to hold that these procedures violated the right to due process and a fair trial under the Constitution; instead, holding, "***The commission's rulings on evidence and on the mode of conducting these proceedings... are not reviewable by the courts***."[14] (emphasis added).

(5) In both *Quirin* and *Yamashita,* the Court traced the history of military commissions and relied on that longstanding tradition since the founding of this Country to conclude that the procedural and constitutional protections afforded in civil criminal trials are inapplicable in military tribunals trying cases for offenses cognizable under the law of war. Both of these cases, as well as others, reflect the Supreme Court's understanding that the procedures contained in Article III and the Fifth and Sixth Amendments were nothing more than a "codification" or an "enshrining" of these criminal procedures as they existed in the common law for trials of offenses against the civil law. *See e.g. Lewis v. United States,* 518 U.S. 322, 325 (1996) (holding despite Sixth Amendment stating "In all criminal prosecutions" there was no right to trial by jury for criminal prosecutions of petty offenses because that right never extended at common law at time of Constitution's drafting); *Duncan v. Louisiana,* 391 U.S. 145, 160 (1968)("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice...."). Likewise, historical precedent and understanding shows the procedures for the prosecution of criminal offenses under the civil law and written into the Constitution were never applied nor were they ever thought to have applied to alien enemy combatants being tried by a military tribunal for an offense cognizable under the law of war. *See e.g.* THE LIEBER CODE OF 1863, SECTION IV, ¶82[15] ("Men, or squads of men, who commit

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[11] *Id.* at 40.
[12] *Yamashita,* 327 U.S. at 6, 18 (internal quotations omitted).
[13] *Id.* at 20.
[14] *Id.* at 20, 23.
[15] Available at www.civilwarhome.com/liebercode.htm. Also attached to this Motion.

hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, ***but shall be treated summarily*** as highway robbers or pirates.") (emphasis added).

(6) Furthermore, since the founding of this Country through at least as late as the Second World War, there has been no "evolution" in the authority, jurisdiction, or procedural protections applicable to military commissions in the context of trying offenses under the law of war. Thus, the common law in the context of military trials for offenses cognizable under the law of war does not support the notion that Constitutional Due Process applies; the Due Process Clause only embraces the Government's attempt to deprive an individual of life, liberty, or property under the civil law, not under the law of war.

(7) Additionally, there is an abundance of constitutional authority supporting the proposition that an alien enemy combatant, such as the accused, has no cognizable constitutional rights. In *Johnson v. Eisentrager*, 339 U.S. 763, 783-85, 70 S.Ct. 936 (1950), the Supreme Court explicitly rejected any notion that an alien enemy combatant tried by a military commission in China for violations of the laws of war could avail themselves to the protections of the Constitution and the Bill of Rights. There the Court stated,

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes v. Bidwell*, 182 U.S. 244 [21 S.Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.[16]

Although there is authority supporting the notion that an alien may gain some constitutional protections once lawfully coming within the territory of the United States, the Supreme Court explained,

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien ***lawfully*** enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. (emphasis added).[17]

Additionally, the cases of *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); and, *McElroy v. Guagliardo*, 361 U.S. 281

[16] *Eisentrager*, 339 U.S. at 784.
[17] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990).

(1960) lend further support to the notion that alien enemy combatants cannot avail themselves of the protections of the Constitution or the Bill of Rights. In those cases, the Supreme Court held that civilian dependent spouses of servicemen and civilian contract employees of the armed forces cannot be subjected to military jurisdiction during a time of peace. "When the Government reaches out to punish ***a citizen*** who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." (Emphasis added.).[18] This is in stark contrast to the defendants in *Eisentrager* who were not citizens, but alien enemy combatants who had never lawfully entered or resided in this Country.

(8) Similar to *Eisentrager*, the accused is neither a civilian nor an American citizen. He is an alien enemy combatant who has never lawfully entered or resided in this Country, and thus has no protections under the Constitution or the Bill of Rights. To the extent the President has extended the accused any "due process" through our full and fair commission proceedings, it comes not from any constitutional obligation that the accused is entitled to, but from our international commitments stemming from at least the Hague Conventions, maybe earlier, saying we will not engage in summary executions and for that matter, summary punishments. As the D.C. Appellate Court in *Hamdan* held, the accused cannot rely on these international agreements as a form of personal right enforceable in any Federal Court; however, the President can certainly decide that we will live up to our agreements internationally and issue his PMO ordering his military subordinates to give the accused a full and fair trial before he is convicted and any punishment for his conduct exacted. Therefore, for the foregoing reasons, the Due Process Clause of the Constitution does not apply to this proceeding or this accused.

b. The Rules Governing The Process Of Discovery In Courts-Martial Are Not Applicable In This Military Commission.

(1) In his military order, the President made it very clear, by the authority vested in him under the Constitution as Commander-in-Chief, the AUMF, and Article 36, UCMJ, "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[19] In deciding that it is not practicable to apply established federal or military rules of procedure and evidence in this Military Commission, the President relied not only on his constitutional war powers, but acted with the express blessing and authorization of Congress. *See Hamdan v. Rumsfeld,* 415 F.3d 33, 38 (D.C. Cir. 2005) (holding, "through the joint resolution [referring to the AUMF] and the two statutes just mentioned [referring to Articles 21 and 36, UCMJ], Congress authorized the military commission that will try [the accused]").

(2) In Article 36, UCMJ, Congress explicitly authorized the President to prescribe pretrial, trial, and posttrial procedures, including modes of proof, for cases to be tried before a military commission. But specifically, Congress gave the President the flexibility and discretion to dispense with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts"[20] if he found it impracticable to so apply

[18] *Reid,* 354 U.S. at 5.
[19] PMO, § 1(f).
[20] 10 U.S.C. §836.

those principles of law and rules of evidence. The President's constitutional war powers combined with Congress' AUMF authorizing the President to use military commissions and congressional statutes 10 U.S.C. §§ 821 and 836, solidify his authority to dispense with the rules and procedures governing discovery in a courts-martial. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[21]

(3) Military commissions have long been recognized as our "common law war courts" and the Supreme Court has acknowledged that "neither their procedure nor their jurisdiction has been prescribed by statute."[22] *See also,* THE LIEBER CODE OF 1863[23] ("Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war.... In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions."); *and* The Modac Indian Prisoners, 14 Op. Atty Gen. 249 (1873) (relying on the Lieber Code as among many precedents supporting the authority of the President to try certain Modac Indian prisoners in military commissions for violations of the common law of war). Not only has Congress declined to statutorily prescribe the procedures governing trials by military commission, Congress explicitly gave that authority to the President in Article 36, UCMJ.

(4) This virtually identical argument by the Defense was pressed in the Supreme Court case of *Yamashita v. Styler.*[24] There, it was urged that Articles of War 25 and 38 applied to a military commission and that General Yamashita's commission admitted evidence in violation of those Articles. Of note, both Articles expressly mentioned military commissions as well as military courts-martial. That notwithstanding, the Supreme Court held,

> We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." ***In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them.***
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> ...
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> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. ***But it did not thereby make subject to the***

[21] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring).
[22] *Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952).
[23] See note 14, *supra.*
[24] 327 U.S. 1 (1946).

> ***Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons.*** The Articles recognized but one kind of military commission, not two. ***But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials.***
>
> ...
>
> It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. ***The Articles left the control over the procedure in such a case where it had previously been, with the military command.*** (Emphasis added).[25]

Likewise here, the accused is of the class of persons to which the Uniform Code does not apply. At the time of the accused's conduct, he was not subject to the UCMJ and nothing in the UCMJ connotes Congress' intent to make him subject to the UCMJ prior to his capture or for his precapture law of war offenses. To the contrary, through Articles 18 and 21, UCMJ, Congress expressly gave jurisdiction to a general court-martial to try any person, including individuals who are not subject to the Code for offenses under the common law of war, but also preserved the common law military commission as another tribunal capable of trying such persons. Nothing in those Articles, just as in the predecessor Articles of War, indicates that Congress intended to bring in "any person" and make them subject to the Code and grant them all of the protections the Code offers.

(5) Once more, Congress enacted the UCMJ a number of years subsequent to the Supreme Court's decision in *Yamashita* interpreting the predecessor Articles of War, including those Articles that expressly mentioned applicability to military commissions, as not applying to trials of alien enemy combatants by common law military commissions. Congress has also made numerous amendments to the UCMJ, and to this date, nothing appears in the UCMJ indicating Congress' disapproval of the Supreme Court's interpretation in *Yamashita*. It should be presumed that when Congress enacted the UCMJ, it did so with full knowledge of the Supreme Court's decision in *Yamashita*. And if Congress disagreed with the High Court's interpretation of Articles of War not applying to military commissions of alien enemy combatants, it would have so indicated in the UCMJ. "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."[26] *See also Keene v. United States*, 508 U.S. 200, 209 (1993) (presuming Congress' comprehensive revision of the Judicial Code did not displace precedent interpreting the prior Code unless such intent was clearly made).

(6) The accused's military commission was not convened by virtue of the UCMJ, but pursuant to the common law of war. Thus, the rules, procedures, and precedents governing

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[25] 327 U.S. at 20.

[26] *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957).

discovery in a courts-martial convened by virtue of the UCMJ are inapplicable to this accused being tried by a common law military commission convened by virtue of the common law of war.

(7) In determining that the rules of procedure and evidence used in an everyday criminal trial are inapplicable to these military commissions convened for the purpose of adjudicating offenses under the law of war by alien enemy combatants, the President relied on both constitutional and congressional authorization backed by years of historical precedent. Both the D.C. Court of Appeals in *Hamdan* and the U.S. Supreme Court in *Yamashita* and *Madsen* confirm the President's authority to establish what the rules of procedure will be for the accused's military commission. With the exception of the procedures outlined in the PMO, the President, under the authority of Congress, delegated to the Secretary of Defense and his designees the authority to promulgate more detailed rules governing the procedures for this Military Commission. That determination has a sound basis in law and should not be disturbed by this Commission. Accordingly, the Presiding Officer should find the Defense's motion lacks any merit and decline to grant any relief.

7. Burdens. The Burden is on the accused to establish any entitlement to his requested relief.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence. The following evidence may be submitted in support of certain factual allegations:

[redacted]

10. Additional Information. None

11. Attachments. The Lieber Code of 1863.

12. Submitted by:

[redacted]
Major, U.S. Marine Corps
Prosecutor

Assistant Prosecutors
[redacted] Lieutenant, USN
[redacted] Lieutenant, USNR

The Lieber Code of 1863

CORRESPONDENCE, ORDERS, REPORTS, AND RETURNS OF THE UNION AUTHORITIES FROM JANUARY 1 TO DECEMBER 31, 1863.--#7
O.R.--SERIES III--VOLUME III [S# 124]

GENERAL ORDERS No. 100.

WAR DEPT., *ADJT. GENERAL'S OFFICE,*
Washington, April 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL.D., and revised by a board of officers, of which Maj. Gen. E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

By order of the Secretary of War:
E. D. TOWNSEND,
Assistant Adjutant-General.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

SECTION I.--*Martial law--Military jurisdiction--Military necessity--Retaliation.*

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief, or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity--virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist or are expected and must be prepared for. Its most complete sway is

allowed--even in the commander's own country--when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government--legislative, executive, or administrative--whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the Army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to

the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

16. Military necessity does not admit of cruelty--that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of

nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably--that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.--*Public and private property of the enemy--Protection of persons, and especially of women; of religion, the arts and sciences--Punishment of crimes against the inhabitants of hostile countries.*

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful-- on the contrary, it is held to be a serious breach of the law of war--to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character-such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such

as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and the churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war--such as judges, administrative or political officers, officers of city or communal governments--are paid from the public revenue of the invaded territory until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property (that is, of a thing), and of personality (that is, of humanity), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment

as may seem adequate for the gravity of the offense.

A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred.

SECTION III.--*Deserters--Prisoners of war--Hostages--Booty on the battle-field.*

48. Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the Army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American Army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their Army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the Army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign State, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American Army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the Army, under the direction of the commander, unless otherwise ordered by the Government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they have been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war, being a public enemy, is the prisoner of the Government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The Government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed, in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their

own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.

SECTION IV.--*Partisans--Armed enemies not belonging to the hostile army--Scouts--Armed prowlers-- War-rebels.*

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or to armed violence.

SECTION V.--*Safe-conduct--Spies-- War-traitors-- Captured messengers-Abuse of the flag of truce.*

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the Government or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers accredited to the enemy may receive safe-conducts through the territories occupied by the belligerent armies.

there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory or foreign visitors in the same can claim no immunity from this law. They may communicate with foreign parts or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army or from a besieged place to another portion of the same army or its government, if armed, and in the uniform of his army, and if captured while doing so in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the Government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterward captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.--*Exchange of prisoners--Flags of truce--Flags of protection.*

105. Exchanges of prisoners take place--number for number--rank for rank--wounded for wounded--with added condition for added condition--such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanction of the Government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange, nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable as soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals within the territory of the

enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.--*The parole.*

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual, but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war unless exchanged.

This pledge refers only to the active service in the field against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be

employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it he may arrest, confine, or detain them.

SECTION VIII.--*Armistice--Capitulation.*

135. An armistice is the cessation of active hostilities for a period agreed between belligerents. It must be agreed upon in writing and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared without conditions it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special--that is, referring to certain troops or certain localities only. An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, does in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists whether the besieged have a right to repair breaches or to erect new works of defense within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties the other party is released from all obligation to observe it.

146. Prisoners taken in the act of breaking an armistice must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement.

SECTION IX.--*Assassination.*

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

SECTION X.--*Insurrection-- Civil war--Rebellion.*

149. Insurrection is the rising of people in arms against their government, or portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles

future relations between the contending parties.

154. Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes--that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens in revolted territories against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens, of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

This Page last updated 02/10/02

RETURN TO CIVIL WAR ARMIES PAGE

UNITED STATES OF AMERICA	PO 2 B
v.	**Discovery Status Order**
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**1 March 2006**

This Discovery Status Order has been issued sua sponte by the Presiding Officer to ensure that the discovery process in this matter is being conducted in such a manner as to ensure a full and fair trial.

1. The Prosecution shall provide a succinct summary of the manner in which the Prosecution has to date complied with the individual subparts of paragraph 14 of the Discovery Order of 19 December 2005 (PO 2). The Prosecution response to this Discovery Status Order shall be filed not later than 1630 on 8 March 2006.

2. Within 2 duty days of receipt of the Prosecution response to this Discovery Status Order the Detailed Defense Counsel shall provide a reply. That reply shall indicate with what information the Detailed Defense Counsel concurs, with what information he disagrees, and shall, in a separate paragraph or paragraphs, describe with particularity any action or inaction that the Detailed Defense Counsel asserts is a deficiency in the Prosecution's compliance with discovery and why any such action or inaction is defective under Discovery Order (PO-2).

3. The Detailed Defense Counsel Shall provide a succinct summary of the manner in which the Defense has to date complied with the individual subparts of paragraph 15 of the Discovery Order of 19 December 2005 (PO-2). The Defense response to this Discovery Status Order shall be filed not later than 1630 7 March 2006.

4. Within 2 duty days of receipt of the Defense response to this Discovery Status Order the Prosecution shall provide a reply. That reply shall indicate with what information the Prosecution concurs, with what information he disagrees, and shall, in a separate paragraph or paragraphs, describe with particularity any action or inaction that the Prosecution asserts is a deficiency in the Defense's compliance with discovery and why any such action or inaction is defective under Discovery Order (PO-2)

IT IS SO ORDERED

R. S. CHESTER
COL, USMC
Presiding Officer

UNITED STATES OF AMERICA	**D 7 KHADR**
	PROSECUTION RESPONSE
v.	To Defense Motion to Abate Proceedings of the Military Commission Due to MCO No. 1's Fatal Inconsistency With the President's Military Order
OMAR AHMED KHADR	**1 March 2006**

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Relief. The Defense motion should be denied.

3. Overview. The Defense requested relief to abate commission proceedings due to, as Defense alleged, "MCO No. 1's Fatal Inconsistency with the President's Military Order" is, in itself, fatally flawed. **The revised MCO No. 1, and the changes thereto, are consistent with, and unequivocally ensure, the President's Military Order to provide for "a full and fair trial, with the military commission sitting as the triers of both fact and law."**

4. Facts.

a. *"When lawless wretches become so impudent and powerful as not to be controlled and governed by the ordinary tribunals of a country, armies are called out, and the laws of war invoked."*[1]

b. On September 11, 2001, "lawless wretches" known as members of the al Qaida terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of more than 3000 lives; the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.

c. One week later in response to these "acts of treacherous violence," Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2]

d. Subsequent to the AUMF, the President issued a Military Order, where, among other things, he found, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to

[1] Honorable James Speed, Attorney General, 11 Op. Atty Gen. 297 (1865)(emphasis added).
[2] Authorization for Use of Military Force, 115 Stat. 224 (hereinafter AUMF).

this order... to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[3] Expressly relying on his authority as Commander-in-Chief under the Constitution, the AUMF, and Articles 21 and 36, Uniform Code of Military Justice, the President directed, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed...."[4] In establishing military tribunals to adjudicate individuals alleged to have committed offenses under the law of war, the President, among others, made this specific determination:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, ***I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.*** (Emphasis added).[5]

The President further directed the Secretary of Defense, "as a military function," to "issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out..." the President's direction for military commissions.[6]

e. On 21 March 2002, the Secretary of Defense issued Military Commission Order No. 1 (MCO No. 1) that implemented policy, assigned responsibility, and prescribed procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

f. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan and paid numerous visits to Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and at times personally met many senior al Qaida leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaida training camps and guest houses.

g. After al Qaida's terrorist attacks on September 11, 2001, the accused received training from al Qaida on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. The accused then conducted surveillance and reconnaissance against U.S. military forces and convoys at an airport near Khost, Afghanistan. He then received one month of training on landmines and soon thereafter joined a group of al Qaida operatives and converted landmines into improvised explosive devices (IEDs) capable of remote detonation. The accused and other al Qaida operatives then buried these IEDs in the ground at areas they knew, based on prior surveillance and reconnaissance, U.S. troops would be traversing.

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[3] President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001)(hereinafter PMO).
[4] 66 Fed. Reg. 57833; *see also* at § 4(a); Article 21 and 36, UCMJ (10 U.S.C. §§ 821 and 836).
[5] PMO, § 1(f).
[6] *Id.* at § 4(b).

h. On or about July 27, 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. As U.S. forces approached the compound, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. Toward the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. American forces then shot and wounded the accused, and after his capture, American medics the accused life saving medical treatment.

i. In accordance with his PMO, the President designated the accused in this case for trial by military commission on 30 July 2005. On 4 November 2005 the Appointing Authority approved the charges against the accused, and subsequently referred them to this Military Commission for trial in accordance with the PMO and the implementing directives, orders and instructions.

j. On 31 August 2005, the Secretary of Defense issued the revised MCO No. 1 that superseded the previous MCO No. 1 of 21 March 2002, but served the same purpose to implement policy, assign responsibility, and prescribe procedures under the U.S. Constitution, Article II, section 2 and the President's Military Order (PMO), for trials before military commission of individuals subject to the PMO.

k. This change in MCO No. 1, included a DoD OASD (PA) press release headlined "**Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures.**" The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Most importantly, it was cited that "**[t]the principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury.**" (emphasis added).

l. On this same day, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . **the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law,** challenges, and interlocutory questions. " The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the presiding officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the presiding officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the presiding officer." (emphasis added).

m. The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and that the changes "will make for a more orderly process."

n. Other changes that reinforced the accused's right to a full and fair trial, and independence of defense were also made. For example, upon request and approval of a specific

named detailed defense counsel, the decision whether to excuse the originally detailed defense counsel is "made by the chief defense counsel, not the appointing authority."

o. When asked if the changes that "looks like to some degree a fundamental restructuring of the commission . . ." and whether changing the MCO was " an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said -- no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission.

5. Legal Authority.

a. President's Military Order (PMO), 66 Fed. Reg. 57,833 (Nov. 16, 2001).
b. Military Commission Order No. 1 (MCO No. 1) (REVISED Aug. 31, 2005).
c. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
d. *Udall v. Tallman*, 380 U.S. 1 (1965).
e. *National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688 (2005).
f. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *cert. granted* Lexis 8222, No. 05-184 (U.S. 2005).

6. Discussion.

a. Military Commission Order No. 1 is consistent with the President's Military Order

(1) Military Commission Order No. 1 of 31 August 2005 (hereinafter "MCO No.1") is consistent with the President's Military Order of November 13, 2001 (hereinafter "PMO"), including the requirement that the accused be provided a full and fair trial, with the military commission sitting as the triers of both fact and law.[7] The PMO requires only that the military commission members, collectively, sit as the "triers of both fact and law."[8] Section 4(C)(2), in other words, requires that the commission as a whole—as opposed to some outside body external to the appointed commission members—decide all questions of fact and law. That is precisely what occurs under the amended MCO: the commission's Presiding Officer rules "upon all questions of law,"[9] and the remaining members of the commission determine "the findings [of fact] and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer."[10] Taken as a whole, the Presiding Officer making his legal decisions and the other members making their factual decisions, together, constitute "triers of both fact and law" as required by the PMO.

(2) There is no basis for reading the language of section 4(c)(2) ("sits as triers of both fact and law") to require each commission member to decide all questions of law and fact. When

[7] *See* PMO ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism"), §4(c)(2), 66 Fed. Reg. 57,833 (November 13, 2001).
[8] *Id.*
[9] MCO No. 1 §4A(5)(a),
[10] Id., § 4A(6).

placed in the context of other provisions of the PMO, it is clear that section 4(c)(2) merely requires that *some* from among the commission members must resolve all legal or factual questions. Section 4(c)(3), for example, distinguishes between the roles of the "presiding officer" and "other member[s]," thus expressly contemplating the separate allocation of authority among military commission members.[11] Sections 4(c)(6) and (c)(7) provide for conviction and sentencing "only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present." By making clear that the military commission need not act by unanimity or with all members present, these provisions, together with section 4(c)(3), indicate that there is no requirement for each member to decide all questions of fact and law.

b. The Secretary of Defense has the authority to issue MCO No. 1 and revisions thereto

(1) There is no basis for declaring the changes to MCO No.1 inconsistent with the PMO. The President entrusted the Secretary of Defense with broad authority to promulgate such orders and regulations as may be necessary to carry out the PMO to provide for trial by military commission, including "rules for the conduct of the proceedings of military commissions." *See* PMO, §§ 4(b), 4(c), and 6(a) ("The Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.") It is accordingly the Secretary of Defense, not this commission, who has discretion to adopt any reasonable interpretation of the PMO. *See Udall v. Tallman*, 380 U.S. 1, 18 (1965)(agency interpretation of President's order is lawful "if...the [agency]'s interpretation is not unreasonable, if the language of the orders bears [its] construction"). In particular, the Secretary of Defense has authority under section 4(b) to specify the duties for the commission members to the extent that the President has not expressly done so in his order (as he has through the eight specific requirements in section 4(c)). *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S 837, 843 (1984) (agency's power to administer a statute "necessarily requires the formulation of policy and the making of any rules to fill any gap left, implicitly or explicitly, by Congress")(internal quotation marks and citations omitted).

(2) In promulgating the changes to MCO No. 1 on 31 August 2005, the Secretary of Defense determined that nothing in the PMO, including section 4(c)(2), is inconsistent with those changes. Even if such a determination is not controlling of its own force before this commission, it is controlling in this context because, as explained above, that determination plainly reflects a reasonable reading of the PMO; therefore, deference should be given to the Secretary of Defense's determination.

(3) "Ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *See National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). Filling these gaps, the Court explained, involved different policy choices that agencies are better equipped to make than courts.[12] If a statute is ambiguous, and the

[11]The revised MCO No.1, of course, maintains the specific procedure set forth in section 4(c)(3), allowing a majority of the commission to override the presiding officer's ruling on the admissibility of evidence.
[12] Id.

implementing agency's construction reasonable, federal courts are required to accept the agency's construction of a statute, even if the agency's reading differs from what the court believes is the best statutory construction.[13]

(4) To support its position on the proper interpretation of the PMO, the Defense cites to the fact that both Col Brownback, as the Presiding Officer in *U.S. v Hicks*, and General Hemingway, the Legal Advisor to the Appointing Authority, have at one time held the identical position that the defense now claims. This fact is of no consequence, and actually illustrates the Prosecution's position that reasonable minds can disagree on the interpretation of the PMO, as Col Brownback's cited ruling was made *only after* Col Brownback attempted to hold sessions on his own (which based on his email correspondence to various counsel[14] he believed was proper under the President's Military Order and even the *original* MCO No. 1). It was only after he was given a specific directive by the Legal Advisor to the Appointing Authority not to hold sessions of the commission outside the presence of other members did Col Brownback make the ruling cited by the defense. This difference of opinion between the Presiding Officer and the Legal Advisor is a perfect illustration of how reasonable minds may disagree regarding the requirement of having the entire commission present under the PMO, and, therefore proves that the Secretary of Defense's current interpretation as set forth in the revised MCO No. 1 is, in fact, reasonable. However, in any event, the Legal Advisor's prior interpretation of the PMO has no binding, legal effect and has since changed.

(5) Even a change by an agency in its *own previous interpretation* of a statute, providing the change is reasonable, still requires deference be given to the agency's new interpretation. (Emphasis added). *See National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005). [15]"An initial agency interpretation is not instantly carved in stone. On the contrary, the agency must consider *varying interpretations* and the wisdom of its policy on a continuing basis."[16] In amending MCO No. 1, the Secretary of Defense made just such a change, based the change on sound reasoning, and the Legal Advisor to the Appointing Authority explicitly adopted that reasoning; which sufficiently foreclosed the issue of the Legal Advisor's past interpretation of the PMO.

(6) The recent change in MCO No. 1 included a DoD OASD (PA) press release headlined "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures." The press release went on to state "these changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commission proceedings that began in late 2004." Even if such a determination is not controlling of its own force before this commission, it is controlling *in this context* because, as explained above, that determination plainly reflects a reasonable reading of the PMO and therefore there is no warrant for not deferring to the Secretary of Defense's determination.

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[13] Id.

[14] See *U.S. v Hamdan* Record of Trial, Volume 3, Review Exhibit 12, Pages 8-10 of 15 for Col Brownback's email and Page 14 of 15 for the Legal Advisors' opinion of 11 August 2004. Found at http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf

[15] *See National Cable & Telecommunications Association, et al v. Brand X Internet Services et al*, 125 S.Ct 2688, 2699-2700 (2005).

[16] Id. at 2699-2700.

(7) Following the revision to MCO No. 1, the Legal Advisor to the Appointing Authority held a press conference and reiterated that ". . . the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges, and interlocutory questions."[17] The Legal Advisor specifically noted the previous order and the legal effect of the revised MCO No. 1, ". . . in the original order all members, including the Presiding Officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the Presiding Officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the Presiding Officer."

(8) The Legal Advisor explained the changes resulted, in part, on experience from commission sessions in August 2004, and when asked if the changes were "to some degree a fundamental restructuring of the commission . . . and an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?" the Legal Advisor unequivocally said -- no. The changes were the result of lessons learned, made to improve the process, and consistent with the overall purpose of the commission. Such changes, for such reasons, were the exact type of analysis that the Supreme Court stated would, could and should be made by implementing agencies as they continue to consider the wisdom of their policies, and why such changes should be given deference.[18]

(9) Although the government concedes that the defense's position on the interpretation of the PMO could also be a reasonable interpretation of the PMO, it is the Secretary of Defense's reasonable interpretation that must trump, as it is ultimately his agency which is responsible for executing the President's Military Order to try individuals by military commission.

c. The President has not expressed any disagreement with the revised MCO No. 1

(1) The Department of Defense has publicly and unambiguously stated its position that the changes that have been made to MCO No.1 are "consistent with the President's Military Order of Nov. 13, 2001 that established the military commission process to try enemy combatants for alleged violations of the law of war." *See* Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at http://www.defenselink.mil/releases/2005/ nr20050831-4608.html). If the President, as Chief Executive and Commander in Chief of the Armed Forces believed that his order had been violated by the promulgation of the revised MCO No.1, he could have addressed that issue by ordering the Secretary of Defense, his subordinate, to rescind the revised order. He did not do so.

(2) The President's silence on this issue should be reasonably interpreted as his acceptance of the Secretary of Defense's conclusion that the changes are consistent with the PMO, particularly considering that the changes were made public on 31 August 2005 after coordination with various agencies in the United States Government. *See* Special Defense

[17] This statement by the Legal Advisor to the Appointing Authority has, in effect, rescinded any earlier legal opinions he may have given that run contrary to his present position.

[18] *See National Cable and Telecommunications Association v Brand X at 2699-2700.*

Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html). It is implausible to believe that the President was not aware of the changes that were made to MCO No.1 on 31 August 2004. The President's acceptance of the Secretary of Defense's determination that MCO No. 1 is consistent with the PMO provides even greater reason for deferring to that determination. Given that the President expressly entrusted the Secretary of Defense with the power to interpret and implement the PMO, the revised MCO No. 1 should not be revisited by this commission absent a clear, palpable, and unequivocal conflict between the two documents—and there is none.

(3) The revised MCO No. 1, and the changes thereto, are consistent with, and unequivocally ensure, the President's Military Order to provide for "a full and fair trial, with the military commission sitting as the triers of both fact and law."; therefore, the Defense motion to abate the proceedings should be denied.

7. Burdens. As the movant, Defense bears the burden to show that MCO No. 1 is in conflict, fatally or otherwise, with the PMO, and denies the accused's right to a full and fair trial. Defense attempts to disguise this as a "jurisdictional" motion and shift the burden to the Prosecution; however, Defense's motion challenges how rather than whether the accused may be tried by a military commission. An argument "how the commission may try" the accused is "by no stretch a jurisdictional argument."[19] The PMO is the jurisdiction authority as to "whether" the accused is subject to trial by military commission. MCO No. 1 implements procedures "how" the accused shall be tried. The PMO and MCO No. 1 are not in conflict, and any perceived procedural inconsistency by Defense does not make a non-jurisdictional issue a jurisdictional defect.

8. Oral Argument. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

9. Witnesses and Evidence.

a. No Prosecution witnesses are required for purposes of our response to the Defense motion.

b. Prosecution evidence in support of our response is the following:

1. [redacted]

2. [redacted]

3. Department of Defense News Release of 31 August 2005 "Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures" (available at http://www.defenselink.mil/releases/2005/ nr20050831-4608.html)

[19] See *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005).

4. Special Defense Department Briefing on Military Commissions from the Legal Advisor to the Appointing Authority, 31 August 2005. (Briefing can be found at http://www.defenselink.mil/transcripts/ 2005/tr20050831-3821.html)

10. Additional Information.

11. Attachments. The Prosecution evidence listed above in paragraph 9(b)(1)-(3).

12. Submitted by:

[redacted]
Major, U.S. Marine Corps
Prosecutor

Assistant Prosecutors
[redacted]Lieutenant, USN
[redacted]Lieutenant, USNR

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Release

On the Web:
http://www.defenselink.mil/releases/2005/nr20050831-4608.html
Media contact: +1 (703) 697-5131

Public contact:
http://www.dod.mil/faq/comment.html
or +1 (703) 428-0711

IMMEDIATE RELEASE

No. 897-05
August 31, 2005

Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures

As the Department of Defense continues to move forward with military commission, the secretary of defense today approved changes to improve military commission procedures. Military commissions have historically been used to try violations of the law of armed conflict and related offenses.

These changes follow a careful review of commission procedures and take into account a number of factors, including lessons learned from military commissions proceedings that began in late 2004. Other factors included a review of relevant domestic and international legal standards and suggestions from outside organizations on possible improvements to the commission process. DoD will continue to evaluate how we conduct commissions and, where appropriate, make changes that improve the process.

The principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury. One of the changes is that the presiding officer will be responsible for deciding most questions of law while the other panel members will have the authority to determine commission findings and decide any sentence.

Previously, the presiding officer and other panel members together determined findings and sentences as well as most legal questions. The new procedures remove the presiding officer from voting on findings and sentencing and give the other panel members sole responsibility for these determinations, while allocating responsibility for ruling on most questions of law to the presiding officer.

Also approved today were clarifications to the provisions governing the presence of the accused at a trial and access by the accused to classified information. The new provisions make clear that the accused shall be present except when necessary to protect classified information and where the presiding officer has concluded that admission of such information would not prejudice a fair trial.

They also make clear that the presiding officer must exclude information from trial if the accused would be denied a full and fair trial from lack of access to the information. If the accused is denied access to classified information admitted at trial, his military defense counsel will continue to have access to the information. Other changes approved include lengthening the amount of time for the Military Commissions Review Panel to review the record of each case.

These changes will be reflected in a revision to Military Commission Order No. 1 and are effective immediately. They are consistent with the president's military order of Nov. 13, 2001 that established the military commission process to try enemy combatants for alleged violations of the law of war.

For more information about these changes, see the Military Commissions Changes fact sheet at http://www.defenselink.mil/news/Aug2005/d20050831fact.pdf . For more information related to the detainees currently at Guantanamo, see the Guantanamo By the Numbers fact sheet at http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf .

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News Transcript

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Presenter: Legal Advisor to the Appointing Authority for Military Commissions Brig. Gen. Thomas L. Hemingway

Wednesday, August 31, 2005 1:01 p.m. EDT

Special Defense Department Briefing on Military Commissions

MODERATOR: Ladies and gentlemen, thank you for joining us today for this update on military commissions. We have with us today, Brigadier General Tom Hemingway who serves as the legal advisor to the appointing authority for the Office of Military Commissions. Part of our commitment to ensure the transparency of this process includes having you updated from here in the Pentagon with senior Defense officials, and with that in mind, General Hemingway has agreed to answer your questions about recently approved changes to the ongoing commissions' process.

With that, I'll turn it over to General Hemingway.

GEN. HEMINGWAY: Thanks, Michael. And thank you for being here this afternoon.

The changes which have been approved by the secretary to Military Commission Order Number One can be viewed best, I think, in a comparative fashion. Under the old order, an accused had no more than seven members on a commission, including the presiding officer. Under the new military commission order, on a non-capital case there will be a presiding officer and at least three members; on a capital case there will be a presiding officer and at least seven other members. The notable difference here is there's no cap. As you can see the appointing authority has discretion to appoint a greater number than under the original order. Additionally, as far as alternate members are concerned, the original order provided for one or two alternates, and the new order provides that there will be at least one or more giving the appointing authority the discretion to appoint a greater number if he deems it advisable given the number of people on the commission.

Now, probably the most significant change that we've made in the new Military Commission Order is the presiding officer will rule on all questions of law, challenges and interlocutory questions. As you know, in the original order all members, including the presiding officer, decided all questions of law and fact. As far as evidence is concerned, the commission members remain authorized to take exception to rulings of the presiding officer on admission of evidence. But as far as questions of law and interlocutory questions, challenges in particular, those will be rulings for the presiding officer.

I think based on our experience last August, this will make for a more orderly process. As you know, when we initially started with these proceedings, challenges for cause had to come up here for resolution by the appointing authority. And aligning this more in tune with a judge/jury model I think will make for a more efficient and orderly process.

Under the original order, the presiding officer and all members voted on findings and sentence. Under this order, the presiding officer will not vote on findings and sentence; he will instruct, but will not participate in the closed deliberations of the commission.

We've also made a modification from the original order as far as the accused's presence. Originally the Military Commission Order provided that the accused "may be present" unless it was inconsistent with national security. The emphasis is now that the accused "shall be present" to the extent consistent with national security, and if he's denied access, the presiding officer must exclude the evidence unless its admission would – if the admission would deny the accused a full and fair trial. And quoting from the new order: "Notwithstanding any determination of probative value under" – a prior section – "the presiding officer shall not admit the protected

information as evidence if the admission of such evidence would result in the denial of a full and fair trial."

Additionally, we have changed the period of time that the review panel has to issue its decision. Originally the order said that the panel had 30 days to review a case, which was a significant challenge. We have changed that. It now says that the review panel has 75 days after the receipt of the record of trial to review the case. As you know, under the instruction – I mean the military commission order, the record comes to the appointing authority for an administrative review and then is transmitted to the review panel. The 75 days does not begin until after that administrative review has taken place and the transcript is actually in the hands of the review panel.

There is one other change that we've made that I haven't included on the slides, and that has to do with the alternate defense counsel. As you know, the accused has the opportunity to make a request for a specific named detailed counsel. Under the original order, if that request was granted, the originally detailed counsel was excused, and if the accused wanted him retained, that decision was left to the appointing authority. That's been changed now, and that decision will be made by the chief defense counsel, not the appointing authority.

With that, I'm open to any questions that you may have. Yes?

Q General, this looks like to some degree a fundamental restructuring of the commission. Do you view this as an admission that the commission's system as initially set up by the Pentagon was flawed, as some critics had said all along?

GEN. HEMINGWAY: I don't consider it an admission that the system was flawed. I've maintained consistently that we would try to make those improvements that were necessary to the process as we moved along. We learned lessons when we started these, and these changes are a result of the lessons learned. I in particular thought that we were spending more time addressing the challenges issue up here that could have been resolved during the trial, as they are in most judicial proceedings.

Q Just a little follow-up. Are you going to start – the trials that have already begun, are you going to start over with those? Are those going to proceed?

GEN. HEMINGWAY: Well, the conduct of the proceedings will be under this military commission order. What changes, if any, the appointing authority is going to make as far as the commission members, I don't know.

Q But that –

GEN. HEMINGWAY: That's not been – I haven't discussed that with Mr. Altenburg.

Q The trials that have begun are not going to begin again from scratch.

GEN. HEMINGWAY: Well, it depends on what you mean by "scratch." If the appointing authority appoints additional members, as in at least one of the cases counsel have asked for, then you would have additional voir dire examinations. If you consider that to be beginning from scratch, to that extent, there would be a beginning. But we're not going back, new charges, and starting all over again, which is what I would think would be a complete new beginning.

Q When will you resume or begin, however you want to –

GEN. HEMINGWAY: That's the $64,000 question. As I've said before, as soon as we feel that we have clearance from the courts, we'll be in hearings 35 to 45 days subsequent to that.

Q What kind of clearance do you need from the courts?

GEN. HEMINGWAY: Well, in several of the cases, we're under a restraining order. In the Hamdan case, the Circuit Court of Appeals hasn't issued their mandate yet. So we can't move out on that. And as you know, that case – he has filed for a writ of certiorari with the Supreme Court and at the same time asked the circuit court to stay the issuance of the mandate, pending a decision of the Supreme Court. It's my understanding the first conference of the Supreme Court is late in September, which means we won't know what their decision is on that particular case until October.

On the Hicks case, Judge Kollar-Kotelly, I believe, still has motions under consideration. We don't know if she's going to take argument on those. I know the briefs have been filed. But – so we await that.

And I can't tell you today what the appointing authority's plans are with either the al-Bahlul or al Qosi cases.

Q And additional people being charged – is that imminent?

GEN. HEMINGWAY: I don't want to use the term "imminent." We have additional charges under consideration at this time.

Q So you have had for some time, some weeks, right?

GEN. HEMINGWAY: They've been in my office for about a week and a half, I believe.

Yes, sir?

Q General, if I may try to squeeze you from the other side, in the first question – forgive me – as to which – the predicate was that these were major changes. I was going to ask you if you could react to the notion that these are just tinkering. There have been a lot of critics, as you know, from the ABA to others, and their criticisms range from admission of evidence, probative value, not going outside the civilian system, addressing whether the information was obtained through coercion or worse. These seem not to be addressed. So how would you respond to, I'm afraid, what is the opposite of what you were pressed first, not that it's – (word inaudible) – but it's really trivial?

GEN. HEMINGWAY: Well, I will leave it to members of the media to characterize this as a major change or a minor tinkering. I think it's an improvement to the process, and that's how I would characterize it, and it was made for that purpose, to improve the process.

Q Two quick ones. Am I correct the three – ones I outlined: probative value, whether something was obtained through coercion, no appeal outside this insulated – (inaudible) – all those things still exist, those things that were the objects of criticism?

GEN. HEMINGWAY: Well, as far as probative value, I've discussed that in the media many times. We have not changed that. And quite frankly, I don't see any reason to do so.

As far as the appeal process is concerned, we haven't made any changes to the review panel other than providing them with additional time.

And I've addressed the issue of, you know, coercion before. I talked about it before the Senate. I haven't seen any case involving evidence that was based on that kind of evidence. Now, is this probably going to be litigated at the commission? I suspect so. But I haven't seen a case that would generate my concern in that regard.

Q Just then on the first part, you're not eager to say whether it's trivial or major, I can understand. But what it is, particularly the distinctions between the presiding officer, the changes to his duty and his relationship to the other members, could you say on its own how that improved the process, why is that an improvement?

GEN. HEMINGWAY: Well, you know, it's interesting that you should be asking that question because one of the issues that was frequently raised by members of the media is why do you have them all voting together on everything when it doesn't follow the judge/jury model? Now we have a system that is more aligned with a judge/jury model, and it's my view that that makes it a smoother and more efficient process to have a presiding officer making those rulings. And I've been asked before today and I think it bears repeating here that presiding officers are judge advocates, and when we have solicited nominations from the services, we have asked for presiding officers who have experience as trial judges.

Q General, I was hoping you could elaborate some on the change to the rule on the admission of classified evidence. I'm afraid I just don't have a clear picture of how that applies when you're actually in a trial.

GEN. HEMINGWAY: Well, without a specific instance, you know, I don't want to engage in hypotheticals, but we did not have before a rule that provided for the exclusion of protected information if ultimately it would result in a denial of a full and fair trial. And now we have made a complete and clear statement on that basis.

Q But are there still instances where classified information could be admitted without the defendant being present?

GEN. HEMINGWAY: Well, certainly if it wouldn't result, in the view of the presiding officer, in the denial of a full and fair trial, or if there's classified information to be considered that is not evidence, I could envision the closure of the proceeding. We've already faced that in the initial proceedings when there was a closure during voir dire examination.

Q And in those cases the defendant's attorneys would still be present?

GEN. HEMINGWAY: The detailed defense counsel cannot be excluded from those sessions.

Q When did you first consider to make these changes to the process?

GEN. HEMINGWAY: Oh, a number of months ago. All of these changes have gone through the interagency process. We've worked with the Department of Justice, the Department of State, the National Security Council. And as you know from being in this town, coordination and collaborative work like that takes some time. And it did in this case until we were satisfied we had the best product.

Yes?

Q Sir, forgive me, but how many commission members do we have right now? We have three, including –

GEN. HEMINGWAY: On several of the cases – right. Right, three.

Q Three. So we need one more on those cases.

GEN. HEMINGWAY: That would be correct.

Q So that means, does it not, that we have to start over?

GEN. HEMINGWAY: Well, as I responded to my first question, we have additional steps that need to be conducted. Whether or not that is a "start over" is your characterization, not mine. You know, we didn't get very far initially before we had to put these proceedings in abeyance, so although there might be additional steps, I don't consider them to be big hurdles.

Q For example, in the Hicks case and in Hamdan, we were well into the motions process.

GEN. HEMINGWAY: Sure.

Q So this fourth person is going to have to get up to speed.

GEN. HEMINGWAY: Well, remember that on a lot of those motions now, the presiding officer will be ruling. You know, if there had been any taking of evidence, then the additional member, of course, would be required to read the authenticated record of trial to get up to speed, but that hasn't been the case. We've never reached the point where we were introducing evidence.

Q So we could get started pretty quickly then, you think, once we get through these hurdles of importance?

GEN. HEMINGWAY: I think so. Correct.

Sir.

Q The press release that we were given before the briefing began said that some of the changes stem from suggestions from outside organizations on possible improvements.

GEN. HEMINGWAY: Well –

Q Specifically, which outside organizations and what suggestions did they make?

GEN. HEMINGWAY: Well, I didn't have any personal contact with the suggestions. I will tell you that the change that we made concerning classified evidence and – did come as a result of our discussions with people in the State Department.

Q Is that the outside organization you're talking about, the State Department?

GEN. HEMINGWAY: No. I don't – I can't speak for who they may have consulted or whether or not they made that suggestion on their own.

Q So you're not able to say –

GEN. HEMINGWAY: I –

Q – (off mike) – in the press release which outside organizations?

GEN. HEMINGWAY: Right – I can't specify who they talked to. But I –

Q Do you know that they talked to outside organizations?

GEN. HEMINGWAY: I'm fairly confident that they have talked to representatives and outside organizations. That's correct. Now –

Q Non-governmental organizations?

GEN. HEMINGWAY: I don't know if they talked to non-governmental organizations. Now, I get a regular flow of correspondence from non- governmental organizations unsolicited with a variety of suggestions.

Q Did any of those suggestions convince you to make these changes?

GEN. HEMINGWAY: You know, we've been working on these for a long time, and if these changes satisfy those people who had suggestions, who had complaints, then I'm really satisfied with it. But we made this – these changes and have been working on it for some time to try to produce a better and more efficient system. And I wasn't personally motivated, and I don't know of anybody else in the building who was personally motivated solely in response to those criticisms. But, you know, we get mail all the time. You can't ignore it.

Q Could I just briefly return to the issue I raised at the beginning about whether this is an admission of the previous process was flawed. Last year the Pentagon assured the world that the system developed would result in full and fair trials. You've now changed that system. Can you comment on that? And are you still promising full and fair trials?

GEN. HEMINGWAY: I am. And I did before. It's just that I think that this system is a smoother and a more efficient system for delivering the final end product – a full and fair trial.

Q Is it fairer than it was before?

GEN. HEMINGWAY: I think ultimately it might be, in the eyes of some people. I was – as I told you before, I was satisfied with the system before, but that doesn't mean that I don't want to make it better if it can be made better, and I think this makes it better.

Sir?

Q General, I'm a bit – still hazy on the – what you referred to as the new rule, first time allowing for the exclusion of protected information if it would result – you know, if having it –

GEN. HEMINGWAY: Right.

Q – on a full and fair trial. What I'm hazy about is there are provisions now, are there not, that such information can be included if it's disclosed to defense counsel who have security clearance? It would not – it would be part of the proceeding if it could be disclosed to defense counsel, not to the defendant, who of course has no security clearance. What then, is the change? Wouldn't everything in this category still be able to be included, so long as it were to be disclosed to defense counsel with security clearance?

GEN. HEMINGWAY: Not if it would result in the denial of a full and fair trial. We have clearly stated that before. Many people assumed that anything is going to go in. And we wanted a clear statement that said if doing that results in the denial of a full and fair trial, it's not going to be admitted.

Q So it wouldn't be admitted before the panel; the panel would not be able to consider information that fell into that category.

GEN. HEMINGWAY: That's correct.

Q So that was just a clarification, then, of what the previous order said in – or the intent of the previous order –

GEN. HEMINGWAY: Well, if there was any confusion before, there shouldn't be any confusion now.

Thanks very much.

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Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Tuesday, March 07, 2006 1:56 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

1. The Presiding Officer grants the prosecution request for an extension until 1 April 2006 to provide certain materials as part of its discovery obligations. The Prosecution shall continue to provide all discovery as it becomes available.

2. The Presiding Officer denies the defense request contained in Professor Ahmad's email. The defense may renew their request for a delay or extension if the need arises.

The filings inventory shall be annotated according, and this email thread made a Review exhibit.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

-----Original Message-----
From [redacted]
[mailto [redacted]
Sent: Saturday, March 04, 2006 8:21 AM
To: [redacted]
OMC
Cc: [redacted]
Subject: RE: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Colonel Chester,

The Prosecution is waiting for authority to release as well as declassification of these documents. We will provide both versions (classified and unclassified) to the Defense. In the event that we have release authority

for the classified versions prior to receiving the declassified versions, we will immediately provide the classified versions
and then provide the declassified versions when we receive them.

All of the documents in question are consistent with the IIR's, FBI 302's and CITF Form 40's previously provided to the Defense. They are additional statements made by the accused to intelligence personnel.

The Prosecution opposes any delay in the trial schedule absent a showing by the Defense, once they have reviewed the documents, that the Prosecution's delay in providing the documents impacted the Defense ability to prepare for trial.

V/R,

Major [redacted]

-----Original Message-----
From: [redacted]
Sent: Friday, March 03, 2006 5:03 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Colonel Chester:

The defense does not object to the prosecution's request for an extension of its March 1 discovery deadline (filed that same day), provided that the trial schedule is adjusted accordingly by one month so that the defense is not prejudiced by the prosecution's inability to timely meet its discovery obligations.

The defense requests further that the prosecution clarify whether it is awaiting only release authority, or, as its request for relief suggests, declassification as well. Since all defense counsel have the proper security clearances, there is of course no need for the government to obtain declassification before providing the relevant documents to the defense.

Sincerely,

Muneer Ahmad

Muneer I. Ahmad
Associate Professor of Law
American University Washington College of Law
[redacted]

fax [redacted]
email: [redacted]

-----Original Message-----
From: Hodges, Keith H. CTR OMC
[mailto[redacted]
Sent: Thursday, March 02, 2006 10:49 PM
To: [redacted]
Cc: [redacted]

Subject: RE: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Defense, what is your position on the above request from the Prosecution?

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
[redacted]

> -----Original Message-----
> From: [redacted]
> Sent: Wednesday, March 01, 2006 6:23 PM
> To: Chester, Robert Col OMC; Hodges, Keith H. CTR OMC
> Cc: [redacted]
> [redacted]

[redacted]

> Subject: Prosecution Request for Special Relief IAW POM 4-3 for
> extension of Discovery Deadline in U.S. v. Khadr
>
> Colonel Chester,
>
> The Prosecution respectfully requests relief from the Discovery Order
> and asks that the current deadline of 1 March 2006 be extended to 1
> April 2006. This request is made with the understanding that
> following approval, as soon as practicable, the Prosecution will
> release all required discovery.
>
> The Prosecution is awaiting approval from Southern Command regarding
> release of certain documents to the Defense. This request involves a

> small number of documents, all statements made by the accused to
> Southern Command and Joint Task Force-GTMO Personnel. Statements
> similar to those in question have also been made to investigative
> agents of the Criminal Investigative Task Force and Federal Bureau of
> Investigation. These statements have been provided to the Defense.
>
> The Prosecution initially requested Southern Command approval to
> release and declassify these documents in December 2005. Southern
> Command responded to this request on 31 January 2006; however did not
> state whether the Prosecution had the authority to release the
> requested documents to the Defense or use them during Military
> Commission proceedings. Prior to this request Southern Command had
> been the release authority for similar documents in other Military
> Commission case. Since that time the Prosecution has followed up with

> Southern Command, JTF-GTMO, and the Defense Intelligence Agency
> requesting permission to release the requested documents. While all
> the organizations have an interest in the documents in question, at
> this point no organization has stated that the Prosecution has the
authority to turn the documents over to the Defense.
>
>
> While this release has been pending, the Prosecution has been working
> with each of these organizations to establish a standard operating
> procedure
> (SOP) to handle requests from OMC-P similar to the request sent in
U.S. v.
> Khadr. That SOP is currently being vetted through the affected DoD
> Components and a final SOP should be complete in the near future. The

> Prosecution met with representatives of JTF-GTMO on 28 Feb and 1 March

> to discuss this particular issue. Southern Command and JTF-GTMO SJA
> provided comments to the proposed OMC-P SOP on 1 March, suggesting the

> approval may need to be granted by the Under Secretary of Defense
> (Intelligence). The Prosecution has now forwarded the request to
> USD(I) for comment. This SOP will include who has release authority
> for Department of Defense documents generated at JTF-GTMO. The
> Prosecution will be able to provide these documents as soon as
> permission is granted by the appropriate DoD Component.
>
> The Prosecution has spoken with several potential sentencing witnesses

> who are friends or family of Christopher Speer, the U.S. service
> member that was allegedly killed by the accused on 27 July 2002. The
> Prosecution will provide names for these witnesses when they have
> decided whether they will testify in person or provide an alternate to
live testimony.
>
> V/R,
>

> Major [redacted]
>
>
>

Hodges, Keith

From: [redacted]
Sent:
To:
Cc:

Subject: RE: Trial Schedule -- defense request for modification- PO Decision

1. The Presiding Officer advises that using the information developed during the 8-5 conference, he prepared a trial schedule. All attorneys participating in the 8-5 indicated there was no conflict with the April and June trial terms. Those dates are firm. Unless reason is given to change those dates and the Presiding Officer grants a request to change them, the parties will comply with those dates. If you want the Presiding Officer to change the dates, you may file a motion for a continuance, said motion to be litigated during the 3 April trial term.

2. The parties will be prepared to discuss the remainder of the trial schedule (beyond the 5 June trial term) during the 3 April trial term.

BY DIRECTION OF THE PRESIDING OFFICER
Keith Hodges
Assistant

From: Merriam, John J CPT (PKI)[redacted]
Sent: Tue 3/7/2006 6:08 PM
To: Hodges, Keith
Cc:[redacted]
Subject: Trial Schedule -- defense request for modification

Mr. Hodges:

The members of the defense team have discussed the summary you sent regarding the 8-5 session held by conference call on 22 FEB 2006, and, regretfully, do not agree with all of the material therein. Specifically, the defense did not understand the portion of the trial schedule regarding dates after the April session.

The defense understands the following:
1. We will convene a session the week of 3 April.
2. This session will cover voir dire of the presiding officer, ruling on the Abatement motion (D-7) currently pending, and ruling on the defense motion on Discovery (D-6) currently pending.

3. This session will also cover any additional "law motions" filed before 8 March 2006.

4. Representation of all defense counsel will be clarified. Specifically, Professor Wilson will be read onto the record, LtCol Vokey will announce his qualifications on the record, and any other known representation issues will be clarified or resolved.

Beyond that, the defense team understood that additional trial dates would be developed during the April session with input from parties. The schedule you sent as part of PO 1 O indicates scheduled dates for additional law and evidentiary motions and other matters that the defense understood were still open for discussion.

The defense therefore respectfully requests that the trial schedule with respect to dates after the April session be set aside (or at least viewed as "tentative") until after that session. The defense will be in a better position by the April trial term to outline its anticipated preparation time, and proposes that all dates after the April term be resolved during that term, and not before.

Respectfully submitted,

John Merriam
CPT, JA
Trial Defense Attorney
Fort Lewis, Washington
[redacted]

UNITED STATES OF AMERICA	PO 2
v.	**Prosecution Response to Discovery Status Order**
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**8 March 2006**

The Prosecution has complied with the Discovery Order of 19 December 2005 (PO 2) as follows:

1. Paragraph 14 (a) – The Prosecution has provided all evidence and copies of information that we intend to offer at trial. The Prosecution has requested declassification of certain classified information that has been provided to the Defense. At trial, the Prosecution will likely offer the declassified versions of these documents into evidence consistent with MCO No. 1. The Prosecution will provide the unclassified version of these documents to the Defense as soon as we receive them from the declassification authority.

2. Paragraph 14 (b) – The Prosecution provided a witness list to the Defense on 31 January 2006 that included all witnesses that we intend to call at trial. The witness list provides instructions on contacting all witnesses. The witness list also provides a synopsis of the expected testimony or states that the witness will testify in accordance with their statements provided to the Defense.

The Prosecution will likely be adding additional witnesses to testify during the sentencing phase of the trial if the accused is convicted of any offenses. The Prosecution is continuing to work with the widow, family, and friends of Christopher Speer to identify witnesses who will be testifying in person or offering alternatives to live testimony.

3. Paragraph 14 (c) – The Prosecution has complied with this paragraph.

4. Paragraph 14 (d) – The Prosecution has provided all exculpatory evidence known to the Prosecution.

The Prosecution is currently seeking release authority and declassification of certain information to provide to the Defense. While the Prosecution does not concede that this information is exculpatory or otherwise discoverable under the Discovery Order or MCO No. 1, it does include information demonstrating the accused's cooperation with intelligence interrogators and is consistent with previous statements made to law enforcement personnel. The Prosecution intends to provide this information once approval is granted.

5. Paragraph 14 (e) – The Prosecution has complied with this paragraph.

6. Paragraph 14 (f) – The Prosecution has complied with this paragraph.

Submitted by:

/s/
[redacted]
Major, U.S. Marine Corps
Prosecutor

UNITED STATES OF AMERICA	**PO 2**
v.	**DEFENSE**
OMAR AHMED KHADR	Response to Discovery Status Order
	8 March 2006

1. For the reasons set forth below and in the attachment to this filing, the defense has not complied with the discovery order of 19 December 2005 and the requirements of paragraph 15 of that order.

2. On 27 February 2006, the defense sent the attached memorandum to the prosecution, which explained that the defense was unable to comply with the timelines laid out in the Discovery Order, and the reasons for that inability. The defense has simply not had enough time to digest the information thus far provided by the prosecution, to conduct an independent investigation of the facts, to arrange for expert consultants, including psychiatric experts, to meet with the accused, and otherwise to identify facts, witnesses, documentary, and other evidence that it intends to present at trial. The defense submitted the attached memorandum in an effort to show good faith with the government and keep them apprised of the fact that the defense was not prepared to offer evidence at this time.

3. The defense has every intention of providing the prosecution with notice of defenses, witnesses, and other matters required to be disclosed under the Rules for Courts-Martial and the Discovery Order. However, the defense continues to assert that more time is required for investigation and preparation of a defense, and has repeatedly asked for relief

from the current discovery order. In particular, the defense motion for relief from the Discovery Order (D-6) asked that the Discovery Order be rescinded or replaced by the Rules for Courts-Martial, which provide guidance to counsel on the conduct and timeliness of discovery.

4. Specific responses to the applicable parts of paragraph 15 of the Discovery Order follow:

a. The defense is unable at this time to identify evidence it intends to offer at trial. As soon as witnesses are identified, the defense will provide this information to the government.

b. The defense is unable at this time to provide names and contact numbers of witnesses, other than those already known to and identified by the government, and whom the government intends to call as witnesses. As soon as witnesses are identified, the defense will provide this information to the government.

c. The defense is still in the process of identifying expert witnesses, and is unable to comply at this time with this requirement. As soon as witnesses are identified, the defense will provide this information to the government.

d. The defense is unable to provide prior statements of witnesses at this time. As soon as witnesses are identified, the defense will provide this information to the government.

e. The defense has been unable to explore all possible affirmative defenses that it may raise at trial. The defense is fully cognizant of the requirement for the government to receive notice of such defenses in order to prepare to rebut them. As soon as affirmative defenses are identified, the defense will immediately notify the government. The defense does hereby notify the government that all listed affirmative defenses described in the discovery order, with the exception of the defense of alibi and of entrapment, may potentially be raised.

f. The defense does not anticipate raising the defense of alibi.

g. The defense requires an expert to examine the accused before a determination can be made regarding his competence to stand trial. The defense will attempt to arrange for travel of such an expert to Guantanamo Bay, Cuba, and will notify the government (and seek its assistance) if there are any obstacles to this process that require the assistance of the government.

5. Again, the defense fully intends to provide the government full and timely notice of those things it is required to disclose. The defense requires more time to review prosecution discovery, interview dozens of prosecution witnesses and government agents

who have come into contact with the accused or may have knowledge of the facts, examine the scene of alleged crimes (including Afghanistan and Pakistan), and otherwise investigate the facts of the case. The defense anticipates seeking further relief from the Commission with respect to timelines involved in discovery. Thus far, due to the inability to access the accused without several weeks of prior coordination, and due to the logistical problems inherent in travel to GTMO and in conducting an independent investigation of the facts, the defense is unable to comply with the requirements of the Discovery Order of 19 December 2005. The defense believes that a full and independent investigation is essential to any trial, but particularly one including a charge of murder, and that this investigation will take several months, at a minimum.

6. Attachments: Defense Discovery Response: Memo to Prosecution dated 27 February 2006.

By: 

JOHN J. MERRIAM
CPT, JA
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS, DEFENSE
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

REPLY TO
ATTENTION OF:

27 February 2006

MEMORANDUM FOR Prosecution Team, *U.S. v. Khadr* ATTN: Major Jeff Groharing

SUBJECT: Defense Discovery UP Discovery Order dated 19 December 2005

1. This communication between counsel is made in accordance with the Presiding Officer's Discovery Order dated 19 December 2005. That order, at paragraph 15, requires the defense to provide discovery to the prosecution by 28 February 2006.

2. On 14 February 2006, the defense filed a motion for a continuance. In that motion, the defense requested that the entire timeline established by the Presiding Officer in earlier orders be modified.

a. The defense specifically asked for "modification to timelines identified in other orders of this Commission, including, but not limited to, the Discovery Order issued by the Presiding Officer on 19 December 2005." Continuance Motion at page 2.

b. The defense noted the following facts as part of the justification for the continuance:

> "At present, LtCol Vokey and two of the three other counsels have the initial discovery in their possession. However, none have had the opportunity to review it yet. It is anticipated that it will take at least several weeks to review all of the volumes of discovery provided so far. As a result, the Defense is not ready to file any motions (law or fact), is unable to make discovery or witness requests, and has not been able to develop even basic ideas as to how to defend the case at trial." Continuance Motion at page 5.

c. During the 8-5 conference call held on February 22, 2006, the parties and the Presiding Officer discussed the Defense's pending discovery motion, and it was agreed that the motion would be litigated at the next commission session, during the week of April 3, 2006.

3. At the date of this communication, all four defense counsels now have the prosecution's discovery in their possession. CPT Merriam, detailed defense counsel, received his copy of the 28 disks containing over 5058.9 MB of prosecution discovery by mail on 23 February 2006. Other than that, however, the facts are substantially unchanged from those cited in the continuance request, with respect to the defense's position on discovery.

a. It will take at least several weeks for the defense to go through the material provided by the prosecution. This will include identifying other materials that are reasonably believed to be in the hands of the prosecution, that would ordinarily be discoverable under military discovery rules, and that has not been provided to the defense.

b. After that, the defense will arrange for and conduct travel to Afghanistan and Pakistan for purposes of identifying and interviewing witnesses, viewing the scene of the alleged crime, and otherwise investigating the case.

c. The defense also needs time to visit with their client in order to gain his assistance in the preparation of the defense. Thus far, due solely to obstacles created by the government (such as inordinate delay in acting on the accused's request for Selected Military Counsel, impediments to travel to and from Guantanamo Bay, the lack of any ability to communicate with the accused by telephone, impediments to arranging a meeting with the accused at Guantanamo Bay, etc.), the lead defense counsel has only had the opportunity to spend two hours with the accused during a single 8-day trip to and from Guantanamo Bay. It should here be noted that none of these problems have been caused or exacerbated in any way by government *counsel*; the problems are nonetheless significant impediments to the ability to prepare for trial, and are solely caused by the decisions made by, and processes established by, the government of the United States.

4. Accordingly, at this time the defense is unable to provide the prosecution with discovery items listed in paragraph 15. In making this answer, the defense notes that, during the January 2006 session, all members of the defense made it clear to the prosecution that they were not in a position to make binding commitments on behalf of the defense, since the accused's counsel rights had been exercised but, inexplicably, had not been acted upon. The defense fully intends to provide the prosecution with all required discovery materials when those materials are known, and with plenty of time to prepare for trial.

5. The point of contact for this action is the undersigned counsel.

/s/
JOHN J. MERRIAM
CPT, JA
Detailed Defense Counsel

Muneer I. Ahmad
Associate Professor of Law
American University, Washington College of Law
[redacted]
Washington, DC 20016
tel. [redacted]
Civilian Defense Counsel

Richard J. Wilson
Director, Int'l Human Rights Law Clinic
American Unversity, Washington College of Law
[redacted]
Washington, DC 20016-8184
tel: [redacted]
Civilian Defense Counsel

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Thursday, March 09, 2006 4:35 PM
To: [redacted]
Cc: [redacted]
Subject: RE: PO 2 -- Defense Response to Discovery Status Order

1. The Presiding Officer acknowledges receipt of your reply to the Discovery Status Order, PO 2.

2. Despite the claim in paragraph 3 that the defense "has repeatedly asked for relief from the current discovery order," the only unresolved request concerning Discovery is in the form of D-6. If the defense wants any other relief to the Discovery Order or other matters, they must file a motion in accordance with POM 4-3.

3. The attachment to the Defense response in PO 2 mentions difficulties in being able to contact the accused. While it is always a logistical challenge to visit any client who has been detained - especially at GTMO - it is the Presiding Officer's impression that as counsel and others learn the ropes, the administrative requirements are less burdensome and time more productive. If the defense wants assistance or relief, they should file a motion per POM 4-3 and be prepared to litigate the matter at the 3 April term. Before doing so, it is recommended the defense contact Mr. Harvey who is working on a collection of procedures for the arrangements necessary to see clients at GTMO.

4. Finally, it is important that the parties recognize that the purpose of the Discovery Status Order was to obtain/maintain visibility of the status of discovery. By answering the PO 2, the parties did NOT raise any issue with or request for relief from the Presiding Officer. Requests for relief must be made in accordance with POM 4-3.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant

From: Merriam, John J CPT (PKI) [redacted]
Sent: Wed 3/8/2006 7:24 PM
To: [redacted]
Cc: [redacted]
Subject: PO 2 -- Defense Response to Discovery Status Order

Sir:

Please find the defense response to PO 2B attached.

v/r, <<Defense Discovery Status Response.pdf>>

John Merriam
CPT, JA
Trial Defense Service

Index of Current POMs – April 4, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

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5 - 1 *	Spectators at Military Commissions	September 19, 2005
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8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006
(17)	There is currently no POM 17	
18	8-5 Conferences	March 21, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

UNITED STATES OF AMERICA	PO 2
v.	**Prosecution Reply to Defense Response to Discovery Status Order**
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**10 March 2006**

The Prosecution replies to the Defense response to the Discovery Status Order (PO 2) as follows:

1. Paragraph (1) – The Prosecution concurs with this paragraph.

2. Paragraph (2) – The Prosecution received the memorandum referenced in this paragraph as stated. The Prosecution understands that the Defense may need additional time to provide certain information required under the Discovery Order and does not intend to oppose reasonable requests made by the Defense.

3. Paragraph (3) – The Prosecution is not aware of any relief sought by the Defense with respect to PO 2 with the exception of D-6.

4. Paragraph (4) – As stated by the Defense, the Prosecution has not been provided with any of the information required by paragraph (15) of the Discovery Order, with the exception of notice that the Defense will not raise a defense of alibi or entrapment.

5. Paragraph (5) – In paragraph (5) the Defense raises several issues affecting their ability to complete discovery as required by the Discovery Order. The Prosecution suggests the Defense raise any of these issues in an appropriate motion or special request for relief and request additional time to comply with these requirements. The Prosecution will respond to such a request consistent with POM 4-3.

6. In addition to the specific paragraphs above, the Defense attached a memorandum submitted to the Lead Prosecutor on 27 February 2006. In the memo, the Defense lists several reasons explaining their inability to provide discovery as required by the Discovery Order. The Prosecution recognizes the Defense will likely need additional time to meet discovery obligations and prepare a defense in this case and suggests the Defense file a request with the Presiding Officer consistent with POM 4-3, requesting a specific amount of time for the delay and detailing why that amount of time is required.

7. The Prosecution disagrees with certain facts contained in paragraphs 3 (c) and 4 in the 27 February 2006 memorandum. The U.S. Government has not created any obstacles preventing counsel from meeting with the accused. To be clear, procedures have been put in place, including requiring defense counsel to provide the Staff Judge Advocate for JTF-GTMO (SJA JTF-GTMO) with sufficient notice if counsel want to arrange a meeting with their client. These procedures are not overburdensome, and are necessary to ensure an orderly process is in place to facilitate meetings for all counsel, whether habeas or commission, so they can meet with their clients as required. As stated in the Assistant to the Presiding Officer's 09 March 2006 email

sent at the direction of the Presiding Officer, as counsel become more familiar with the requirements, the administrative requirements will become less burdensome.

8. The Prosecution was not advised of any difficulties the Defense has had meeting with the accused prior to the 22 Feb 2006 conference call. Following that call, I traveled to Guantanamo Bay and met with attorneys from SJA JTF-GTMO and inquired regarding the difficulties LtCol Vokey had meeting with the accused. I was advised that the difficulties were caused by the Defense failing to provide adequate notice to SJA JTF-GTMO in order to arrange the meeting. Once the SJA JTF-GTMO was advised of counsel's intention to meet with the accused, SJA JTF-GTMO then arranged for a meeting with the accused. Rather than placing impediments in the way of counsel, the SJA JTF-GTMO actually went to great lengths to accommodate counsel and the accused. According to the SJA, the accused initially refused to meet with counsel for 24 hours, stating words to the effect that "my counsel works for me, I don't work for him." Only after certain conditions were met, dictated by the accused, did the meeting take place. This is not the fault of SJA JTF-GTMO or the Government and demonstrates a willingness by the SJA JTF-GTMO to assist counsel.

9. The Prosecution agrees that there are logistical challenges presented in representing a detainee held at GTMO. To the extent that any of these challenges are created by procedures put in place by the Government, they are not created to inhibit counsel's ability to represent the accused. Regardless of what might have prevented counsel from meeting with the accused up to this point, the Prosecution has no interest in preventing the Defense from meeting with the accused in order to adequately prepare for trial. In the event the Defense has any additional problems meeting with counsel or being provided any other support necessary to ensure the accused receive a full and fair trial, the Prosecution requests the Defense immediately notify the Appointing Authority's office and the Prosecution to assist.

Submitted by:

/s/
[redacted]
Major, U.S. Marine Corps
Prosecutor

Hodges, Keith

From: Hodges, Keith **Sent:** Fri 2/10/2006 12:07 PM
To: [redacted]
Cc: [redacted]
Subject: PO Decision - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr
Attachments:

1. The Prosecution complied with paragraph 1 below.

2. The Presiding Officer has received no reply or objection from the Defense to the Prosecution's request. Two reminders were sent on 9 Feb.

3. The Presiding Officer grants the Prosecution requested delay as contained in the originating email.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Hodges, Keith
Sent: Friday, January 27, 2006 5:16 PM
To: [redacted]
Cc: [redacted]

Subject: PO Directions - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

The Presiding Officer has directed the following reply.

1. Not later than COB 31 Jan 06, the Prosecution will justify the delay and establish how they have exercised due diligence to date. This information will be provided to the Presiding Officer, Assistant and opposing counsel in the body of an email (with attachments if necessary) replying to this email. The information will be unclassified.

2. The second paragraph of the below email is being interpreted as a request to provide a list of sentencing witnesses also by 1 March. (Further extensions may be requested later if more time is needed.)

3. Given the timing of this request, and to allow the Defense a meaningful opportunity to respond, the extension, to include the one addressed in paragraph 2 above, is granted until 1200, EST, 7 February 2006. If no response is received by the Defense by COB 6 February 2006, the Presiding Officer may direct that the full extension as requested will be approved without further action.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers

Military Commission
keith.hodges@dhs.gov
Voice: [redacted]
Fax: [redacted]

From: [redacted]
Sent: Friday, January 27, 2006 10:23 AM
To: [redacted]
Cc: [redacted]
Subject: Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

Colonel Chester,

In accordance with POM #4-3 the Prosecution makes a special request for relief for extension of the Prosecution's discovery deadline ICO US v Khadr. The Prosecution has worked with due diligence since the inception of this case; however, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 March 2006 so that the Prosecution may obtain release authority for the remaining evidence. The Prosecution will be providing over 1000 pages of discovery it does have approval to release by COB 27 January, and will provide all required discovery as soon as the appropriate releases are obtained.

In addition, the Prosecution will not have a final list for sentencing witnesses, assuming sentencing is required, by 31 January 2006. The Prosecution has discussed the potential of testifying in person during the sentencing phase with several witnesses; however, they have not yet decided whether they will testify. The Prosecution is working with the widow of Christopher Speer and other witnesses on alternatives to live testimony if they choose not to testify in person. The Prosecution will provide all evidence we intend to introduce and witnesses we intend to call as soon as possible.

Very Respectfully,

[redacted]

Major, U.S. Marine Corps

Prosecutor

Office of Military Commissions

[redacted]

Fax: [redacted]

Email: [redacted]

SIPR: [redacted]

[redacted] Maj, DoD OGC

From: [redacted]
Sent: Sunday, January 29, 2006 15:19
To: [redacted]
Cc: [redacted]

Subject: RE: PO Directions - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

Colonel Chester,

1. Justification for extension of Prosecution Discovery Deadline

   a. The Prosecution has made requests of other federal government agencies and components of the Department of Defense to declassify certain documents as well as use classified and declassified versions of those documents at trial if necessary. The Prosecution has also asked for permission to turn over any documents in our possession to the Defense if required by Commission Law. Specifically, the Prosecution has made requests to the FBI, Southern Command, Central Command, the Central Intelligence Agency, Defense Intelligence Agency, and other classification authorities within the Department of Defense. It is important to note that each of these organizations is currently inundated with similar requests from the Office of Administrative Review of the Detention of Enemy Combatants (OARDEC), the Department of Justice concerning a significant amount of Federal litigation, as well as numerous FOIA requests, investigations and Congressional Inquiries regarding detention of enemy combatants at Guantanamo Bay, Cuba. Because of the magnitude of the requests they are receiving, compounded by the fact the War on Terrorism is ongoing, the Office of the Chief Prosecutor must prioritize our requests to these offices and only forward our most pressing requests. Based on our past dealings with these agencies, we found it prudent to forward our requests either directly before or after approval of charges and referral to military commission. I did so in this instance with each organization. The timing of my requests in this case happened to coincide with the holiday season and a very busy time for these organizations. I have diligently followed up on each request and have received assurances that each request is very near complete. I expect to have final action on the requests in the near future. I can support my representations of diligence with a significant amount of email traffic on the issue, but it is all contained on the SIPRNET. Please advise whether additional documentation if required and I will attempt to get this documentation declassified.

   b. It is important to note that the information referred to in the paragraph above is a small portion of the evidence in this case. I will be providing a witness list to the Defense on 31 January that will contain all but a few witnesses for the Prosecution's case in chief. Depending on the responses to our requests referenced above, we may or may not have additional witnesses. I also attempted to serve over 25 CD's containing videos and thousands of pages of documents on the Defense on Friday, 27 Jan 06; however, the Defense representative was unavailable. That discovery will be served on Monday morning. I expect to serve a second discovery release on Tuesday, as I have been advised by a couple of the organizations mentioned above that my requests *should* be answered by Monday. I have also advised Detailed Defense Counsel that I would make documents that I intend to provide, but do not have permission yet, available for viewing in my office. Captain Merriam did in fact view some of the above-mentioned documents and evidence prior to our last session at GTMO. I have extended this same offer to LtCol Vokey and we are going to meet this week while he is in town if he has time. In any event, the subject documents and potential witnesses should be

available for release to Defense in the very near future.

2. Sentencing Witnesses

The Prosecution witness list currently includes several witnesses that will testify during the sentencing phase if the accused is found guilty. In addition to those witnesses, I am working with friends and family of Chris Speer, the soldier the accused is alleged to have murdered, on alternatives to live testimony at the commission trial. The primary concern for these individuals is their safety, considering the accused and his family's significant alleged connections to al Qaida. While the Prosecution intends to use pseudonyms for the majority of witnesses who will be testifying at trial, the nature of a family member's relationship to a victim in this case will be obvious and they have expressed concerns for their safety. I do not foresee adding more than a couple witnesses to the current list for sentencing purposes. Family members have not made their final decision(s); however, I believe it is likely that Prosecution will present an alternative to live testimony to show the direct impact on Chris Speer's family.

3. Extension of the Prosecution discovery deadline for these very limited matters should in no way impact the Defense ability to prepare for scheduled court sessions or cause any delay in commission proceedings.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Email: [redacted]
SIPR: [redacted]

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, January 27, 2006 17:16
To: [redacted]
Subject: PO Directions - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

The Presiding Officer has directed the following reply.

1. Not later than COB 31 Jan 06, the Prosecution will justify the delay and establish how they have exercised due diligence to date. This information will be provided to the Presiding Officer, Assistant and opposing counsel in the body of an email (with attachments if necessary) replying to this email. The information will be unclassified.

2. The second paragraph of the below email is being interpreted as a request to provide a list of sentencing witnesses also by 1 March. (Further extensions may be requested later if more time is needed.)

3. Given the timing of this request, and to allow the Defense a meaningful opportunity to respond, the extension, to include the one addressed in paragraph 2 above, is granted until 1200, EST, 7 February 2006. If no response is received by the Defense by COB 6 February 2006, the Presiding Officer may direct that the full extension as requested will be approved without further action.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: [redacted]
Sent: Friday, January 27, 2006 10:23 AM
To: [redacted]
Cc: [redacted]
Subject: Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

Colonel Chester,

In accordance with POM #4-3 the Prosecution makes a special request for relief for extension of the Prosecution's discovery deadline ICO US v Khadr. The Prosecution has worked with due diligence since the inception of this case; however, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 March 2006 so that the Prosecution may obtain release authority for the remaining evidence. The Prosecution will be providing over 1000 pages of discovery it does have approval to release by COB 27 January, and will provide all required discovery as soon as the appropriate releases are obtained.

In addition, the Prosecution will not have a final list for sentencing witnesses, assuming sentencing is required, by 31 January 2006. The Prosecution has discussed the potential of testifying in person during the sentencing phase with several witnesses; however, they have not yet decided whether they will testify. The Prosecution is working with the widow of Christopher Speer and other witnesses on alternatives to live testimony if they choose not to testify in person. The Prosecution will provide all evidence we intend to introduce and witnesses we intend to call as soon as possible.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Fax: [redacted]
Email: [redacted]
SIPR: [redacted]

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: Chester, Robert Col USSOUTHCOM JTFGTMO

Sent: Sunday, April 02, 2006 5:57 PM

To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO

Subject: FW: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Mr. Hodges:

I have seen no response from the defense to the Government's special request contained below. Please add this e-mail, with its attachments and your solicitation to the defense seeking objections, as the next Review Exhibit.

Very respectfully,
Chester

-----Original Message-----
From: [redacted]
Sent: Thursday, March 30, 2006 12:08 PM
To: [redacted]
Cc: [redacted]
Subject: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Sir,

The Prosecution requests an additional extension of our discovery deadline in U.S. v. Khadr. I have attached our two previous requests and our 8 March 2006 response to the Discovery Status Order. I incorporate the justifications for delay contained in those requests in this filing.

The Prosecution is awaiting release authority for a limited number of documents from Southern Command. The Prosecution will be serving the Defense on 31 March with an unclassified version of seventeen intelligence reports generated as a result of interviews of the accused conducted by intelligence personnel. We have requested permission to provide the classified version to the Defense and will provide the classified version when the permission is granted.

In addition to the reports above, the Prosecution has requested permission to provide additional classified documents to the Defense and to produce declassified versions of those documents. That request is also pending.

Subsequent to our previous filing, the Chief Prosecutor, another OMC Prosecutor, and I met with the Department of Defense Deputy General Counsel for Intelligence regarding this situation. We discussed the current status of our request for release authority and were advised that he would brief the Under Secretary of Defense for Intelligence and the issues should be resolved in the near future. We were hopeful that the requested permission would be granted prior to 31 March and obviate the need for an additional extension; however, that appears unlikely at this point.

For the reasons mentioned above and in the attached Prosecution filings, the Prosecution requests an extension in our discovery deadline.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Fax: [redacted]
Email: [redacted]
SIPR: [redacted]

UNITED STATES OF AMERICA	PO 2
v.	**Prosecution Response to Discovery Status Order**
OMAR AHMED KHADR a/k/a Akhbar Farhad a/k/a Akhbar Farnad	**8 March 2006**

The Prosecution has complied with the Discovery Order of 19 December 2005 (PO 2) as follows:

1. Paragraph 14 (a) – The Prosecution has provided all evidence and copies of information that we intend to offer at trial. The Prosecution has requested declassification of certain classified information that has been provided to the Defense. At trial, the Prosecution will likely offer the declassified versions of these documents into evidence consistent with MCO No. 1. The Prosecution will provide the unclassified version of these documents to the Defense as soon as we receive them from the declassification authority.

2. Paragraph 14 (b) – The Prosecution provided a witness list to the Defense on 31 January 2006 that included all witnesses that we intend to call at trial. The witness list provides instructions on contacting all witnesses. The witness list also provides a synopsis of the expected testimony or states that the witness will testify in accordance with their statements provided to the Defense.

The Prosecution will likely be adding additional witnesses to testify during the sentencing phase of the trial if the accused is convicted of any offenses. The Prosecution is continuing to work with the widow, family, and friends of Christopher Speer to identify witnesses who will be testifying in person or offering alternatives to live testimony.

3. Paragraph 14 (c) – The Prosecution has complied with this paragraph.

4. Paragraph 14 (d) – The Prosecution has provided all exculpatory evidence known to the Prosecution.

The Prosecution is currently seeking release authority and declassification of certain information to provide to the Defense. While the Prosecution does not concede that this information is exculpatory or otherwise discoverable under the Discovery Order or MCO No. 1, it does include information demonstrating the accused's cooperation with intelligence interrogators and is consistent with previous statements made to law enforcement personnel. The Prosecution intends to provide this information once approval is granted.

5. Paragraph 14 (e) – The Prosecution has complied with this paragraph.

6. Paragraph 14 (f) – The Prosecution has complied with this paragraph.

Submitted by:

/s/
[redacted]
Major, U.S. Marine Corps
Prosecutor

[redacted] Maj, DoD OGC

From: [redacted]
Sent: Wednesday, March 01, 2006 18:23
To: Chester, Robert Col OMC; Hodges, Keith H. CTR OMC
Cc: [redacted]

Subject: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Colonel Chester,

The Prosecution respectfully requests relief from the Discovery Order and asks that the current deadline of 1 March 2006 be extended to 1 April 2006. This request is made with the understanding that following approval, as soon as practicable, the Prosecution will release all required discovery.

The Prosecution is awaiting approval from Southern Command regarding release of certain documents to the Defense. This request involves a small number of documents, all statements made by the accused to Southern Command and Joint Task Force-GTMO Personnel. Statements similar to those in question have also been made to investigative agents of the Criminal Investigative Task Force and Federal Bureau of Investigation. These statements have been provided to the Defense.

The Prosecution initially requested Southern Command approval to release and declassify these documents in December 2005. Southern Command responded to this request on 31 January 2006; however did not state whether the Prosecution had the authority to release the requested documents to the Defense or use them during Military Commission proceedings. Prior to this request Southern Command had been the release authority for similar documents in other Military Commission case. Since that time the Prosecution has followed up with Southern Command, JTF-GTMO, and the Defense Intelligence Agency requesting permission to release the requested documents. While all the organizations have an interest in the documents in question, at this point no organization has stated that the Prosecution has
the authority to turn the documents over to the Defense.

While this release has been pending, the Prosecution has been working with each of these organizations to establish a standard operating procedure
(SOP) to handle requests from OMC-P similar to the request sent in U.S. v. Khadr. That SOP is currently being vetted through the affected DoD Components and a final SOP should be complete in the near future. The Prosecution met with representatives of JTF-GTMO on 28 Feb and 1 March to discuss this particular issue. Southern Command and JTF-GTMO SJA provided comments to the proposed OMC-P SOP on 1 March, suggesting the approval may need to be granted by the Under Secretary of Defense (Intelligence). The Prosecution has now forwarded the request to USD(I) for comment. This SOP will include who has release authority for Department of Defense documents generated at JTF-GTMO. The Prosecution will be able to provide these documents as soon as permission is granted by the appropriate DoD Component.

The Prosecution has spoken with several potential sentencing witnesses who are friends or family of Christopher Speer, the U.S. service member that was allegedly killed by the accused on 27 July 2002. The Prosecution will provide names for these witnesses when they have decided whether they will testify in person or provide an alternate to live testimony.

V/R,

Major [redacted]

[redacted] Maj, DoD OGC

From: [redacted]
Sent: Sunday, January 29, 2006 15:19
To: [redacted]
Cc: [redacted]

Subject: RE: PO Directions - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

Colonel Chester,

1. Justification for extension of Prosecution Discovery Deadline

   a. The Prosecution has made requests of other federal government agencies and components of the Department of Defense to declassify certain documents as well as use classified and declassified versions of those documents at trial if necessary. The Prosecution has also asked for permission to turn over any documents in our possession to the Defense if required by Commission Law. Specifically, the Prosecution has made requests to the FBI, Southern Command, Central Command, the Central Intelligence Agency, Defense Intelligence Agency, and other classification authorities within the Department of Defense. It is important to note that each of these organizations is currently inundated with similar requests from the Office of Administrative Review of the Detention of Enemy Combatants (OARDEC), the Department of Justice concerning a significant amount of Federal litigation, as well as numerous FOIA requests, investigations and Congressional Inquiries regarding detention of enemy combatants at Guantanamo Bay, Cuba. Because of the magnitude of the requests they are receiving, compounded by the fact the War on Terrorism is ongoing, the Office of the Chief Prosecutor must prioritize our requests to these offices and only forward our most pressing requests. Based on our past dealings with these agencies, we found it prudent to forward our requests either directly before or after approval of charges and referral to military commission. I did so in this instance with each organization. The timing of my requests in this case happened to coincide with the holiday season and a very busy time for these organizations. I have diligently followed up on each request and have received assurances that each request is very near complete. I expect to have final action on the requests in the near future. I can support my representations of diligence with a significant amount of email traffic on the issue, but it is all contained on the SIPRNET. Please advise whether additional documentation if required and I will attempt to get this documentation declassified.

   b. It is important to note that the information referred to in the paragraph above is a small portion of the evidence in this case. I will be providing a witness list to the Defense on 31 January that will contain all but a few witnesses for the Prosecution's case in chief. Depending on the responses to our requests referenced above, we may or may not have additional witnesses. I also attempted to serve over 25 CD's containing videos and thousands of pages of documents on the Defense on Friday, 27 Jan 06; however, the Defense representative was unavailable. That discovery will be served on Monday morning. I expect to serve a second discovery release on Tuesday, as I have been advised by a couple of the organizations mentioned above that my requests *should* be answered by Monday. I have also advised Detailed Defense Counsel that I would make documents that I intend to provide, but do not have permission yet, available for viewing in my office. Captain Merriam did in fact view some of the above-mentioned documents and evidence prior to our last session at GTMO. I have extended this same offer to LtCol Vokey and we are going to meet this week while he is in town if he has time. In any event, the subject documents and potential witnesses should be

available for release to Defense in the very near future.

2. Sentencing Witnesses

The Prosecution witness list currently includes several witnesses that will testify during the sentencing phase if the accused is found guilty. In addition to those witnesses, I am working with friends and family of Chris Speer, the soldier the accused is alleged to have murdered, on alternatives to live testimony at the commission trial. The primary concern for these individuals is their safety, considering the accused and his family's significant alleged connections to al Qaida. While the Prosecution intends to use pseudonyms for the majority of witnesses who will be testifying at trial, the nature of a family member's relationship to a victim in this case will be obvious and they have expressed concerns for their safety. I do not foresee adding more than a couple witnesses to the current list for sentencing purposes. Family members have not made their final decision(s); however, I believe it is likely that Prosecution will present an alternative to live testimony to show the direct impact on Chris Speer's family.

3. Extension of the Prosecution discovery deadline for these very limited matters should in no way impact the Defense ability to prepare for scheduled court sessions or cause any delay in commission proceedings.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Fax: [redacted]
Email: [redacted]
SIPR: [redacted]

-----Original Message-----
From: Hodges, Keith [redacted]
Sent: Friday, January 27, 2006 17:16
To: [redacted]
Cc: [redacted]
Subject: PO Directions - Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

The Presiding Officer has directed the following reply.

1. Not later than COB 31 Jan 06, the Prosecution will justify the delay and establish how they have exercised due diligence to date. This information will be provided to the Presiding Officer, Assistant and opposing counsel in the body of an email (with attachments if necessary) replying to this email. The information will be unclassified.

2. The second paragraph of the below email is being interpreted as a request to provide a list of sentencing witnesses also by 1 March. (Further extensions may be requested later if more time is needed.)

3. Given the timing of this request, and to allow the Defense a meaningful opportunity to respond, the extension, to include the one addressed in paragraph 2 above, is granted until 1200, EST, 7 February 2006. If no response is received by the Defense by COB 6 February 2006, the Presiding Officer may direct that the full extension as requested will be approved without further action.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: [redacted]
Sent: Friday, January 27, 2006 10:23 AM
To: [redacted]
Cc: [redacted]
Subject: Special Request for Relief for extension of Prosecution Discovery Deadline ICO U.S. v. Khadr

Colonel Chester,

In accordance with POM #4-3 the Prosecution makes a special request for relief for extension of the Prosecution's discovery deadline ICO US v Khadr. The Prosecution has worked with due diligence since the inception of this case; however, there is certain evidence that falls under the discovery order that is still pending approval for release and/or declassification from various originating agencies. The Prosecution respectfully moves that the Presiding Officer grant an extension of the Prosecution's deadline for discovery to 1 March 2006 so that the Prosecution may obtain release authority for the remaining evidence. The Prosecution will be providing over 1000 pages of discovery it does have approval to release by COB 27 January, and will provide all required discovery as soon as the appropriate releases are obtained.

In addition, the Prosecution will not have a final list for sentencing witnesses, assuming sentencing is required, by 31 January 2006. The Prosecution has discussed the potential of testifying in person during the sentencing phase with several witnesses; however, they have not yet decided whether they will testify. The Prosecution is working with the widow of Christopher Speer and other witnesses on alternatives to live testimony if they choose not to testify in person. The Prosecution will provide all evidence we intend to introduce and witnesses we intend to call as soon as possible.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Email:
SIPR: [redacted]

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: [redacted]
Sent: Friday, March 31, 2006 2:53 PM
To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Subject: FW: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

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From: Hodges, Keith [redacted]
Sent: Thursday, March 30, 2006 12:18 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Does the defense object?

FOR THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: [redacted]
Sent: Thursday, March 30, 2006 12:08 PM
To: [redacted]
Cc: [redacted]
Subject: Prosecution Request for Special Relief IAW POM 4-3 for extension of Discovery Deadline in U.S. v. Khadr

Sir,

The Prosecution requests an additional extension of our discovery deadline in U.S. v. Khadr. I have attached our two previous requests and our 8 March 2006 response to the Discovery Status Order. I incorporate the justifications for delay contained in those requests in this filing.

The Prosecution is awaiting release authority for a limited number of documents from Southern Command. The Prosecution will be serving the Defense on 31 March with an unclassified version of seventeen intelligence reports generated as a result of interviews of the accused conducted by intelligence personnel. We have requested permission to provide the classified version to the Defense and will provide the classified version when the permission is granted.

In addition to the reports above, the Prosecution has requested permission to provide additional classified documents to the Defense and to produce declassified versions of those documents. That request is also pending.

Subsequent to our previous filing, the Chief Prosecutor, another OMC Prosecutor, and I met with the Department of Defense Deputy General Counsel for Intelligence regarding this situation. We discussed the current status of our request for release authority and were advised that he would brief the Under Secretary of Defense for Intelligence and the issues should be resolved in the near future. We were hopeful that the requested permission would be granted prior to 31 March and obviate the need for an additional extension; however, that appears unlikely at this point.

For the reasons mentioned above and in the attached Prosecution filings, the Prosecution requests an extension in our discovery deadline.

Very Respectfully,

[redacted]
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]
Fax: [redacted]
Email: [redacted]
SIPR: [redacted]

KHADR
REVIEW EXHIBIT 94

Review Exhibit (RE) 94 is curriculum vitae of Translators "A" and "B."

RE 94 consists of 7 pages.

Translators A and B have requested, and the Presiding Officer has determined that RE 94 not be released on the Department of Defense Public Affairs web site. In this instance Translators A and B's right to personal privacy outweighs the public interest in this information.

RE 94 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 94.

//signed//

M. Harvey
Chief Clerk of Military Commissions

Filings Inventory - US v. Khadr v

PUBLISHED:

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since4 Nov 2005.

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 5: Request for continuance **See also PO 1**	15 Feb 06	17 Feb 06		• ORIG: Defense motion • A. Directions for supplemental information and directions of the PO (16 Feb 06) • B. Prosecution response. • NOTE: Defense complied with its responsibilities under D 5 A in an telephonic 8-5 session on 22 Feb. and a follow-up email on 23 Feb. •	OR – 74 A – 75 B - 76
D 6: Withdrawal of Previous Discovery Order motion and new Discovery Order motion	22 Feb 06	28 Feb 06		• A. Prosecution response.	OR – 77 A – 83
D7: Motion to Abate Proceedings of the Military Commission due to MCO No. 1s Fatal Inconsistency with the President's Military Order	23 Feb 06	1 Mar 06		• Same as D 2, which was ruled upon. Refiled at direction of PO as D 7. • A. Prosecution response, 1 Mar 06	OR – 79 A - 85
				•	
				•	
				•	
				•	

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 1 - Scheduling and Docketing. **See also D 5, defense request for a continuance.**	• Email of 2 Dec announcing first session of week of 9 Jan, 2 Dec 05 • A. Email to remind counsel to respond to PO 1, 7 Dec 05 • B. CPT Merriam's response to PO 1 and POs reply, 8 Dec 05. • C. Prof Wilson's Response to PO 1, 8 Dec. • D. Prof Ahmad's Response to PO 1, 8 Dec • E. Prof Ahmad's email for clarification and PO response, 9 Dec • F. Announcement of specific Jan 06 session times, 9 Dec 05. • G POs bio summary for voir dire, 9 Dec 05. • H. Excusing counsel from sessions at GTMO 16 Dec 05. • I. Trial schedule, 19 Jan 06 • J. Welcome email to LTC Vokey • K. Announcement of Feb trial term and CPT Merriam's response • L. Announcement of Feb Trial term 19 Jan 06 and Mr. Ahmad's response 20 Jan • M - Revised Trial Schedule (23 Jan 2006) • N. Reply to LtCol Vokey concerning the trial schedule, 26 Jan. • NOTE: PO approved DC request for extension until 14 Feb to file a trial calendar. • NOTE: CDC provided Professor Wilson qualifications and notice provided to PO and PO response as to matters mentioned in those documents. See RE 78.	OR - 1 A - 2 B - 13 C - 14 D - 15 E - 16 F - 17 G - 18 H – 19 I – 66 J – 67 K – 68 L – 69 M – 70 N – 71 O - 80

	• O. Trial schedule. • NOTE: Defense request for clarification and PO response RE: PO 1 O. PO clarified. See RE 87.	
PO 2 – Discovery.	• Discovery Order filed with counsel, 19 Dec 05 • NOTE: Prosecution requested delay to provide some discovery granted, 10 Feb. Defense did make objection to prosecution request, • NOTE: PO approved DC request to extend response to PO 2 until 14 Feb. • NOTE: PO granted further extension until 17 Feb. (15 Feb) • NOTE: PO granted prosecution request to provide certain discovery materials to 1 March. RE 92. • A. Modified discovery order, 28 Feb. Objections due 8 Mar. • B. Discovery Status Order, 1 Mar. • Note: PO extended discovery date for prosecution until 1 April. Denied defense request for extension. See RE 86. • Prosecution replied to PO 2 B. See RE 88. • Defense replied to PO 2 B, and Presiding Officer added comments. See RE 89. • C. Prosecution reply to defense response to discovery status order, 10 Mar. RE 91. • NOTE. Prosecution requested to extend discovery deadline. No defense response as of 2 April. See RE 93.	OR – 20 A – 82 B - 84
PO 3 – Voir Dire	• PO 3 - Khadr - Voir Dire questionnaire for the PO and POs reply	OR – 29
PO 4 - Motions	• 25 Jan APO email RE Preserving Objections and POM 4-3 and 12-1	ORIG - 72

PROTECTIVE ORDERS

Pro Ord	Designation	Signed	Date	Topic	RE

#	when signed	Pages			
1	NA	NA	20 Dec 05	Email to counsel to send active protective orders or to request same.	24
				•	

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 1 - Motion for Continuance Based on SDDC Request (5 Jan 06)	5 Jan 06	XXXX	XXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 36 A – 38
D 2 - Motion to Abate Proceedings of the Military Commission due to MCO No. 1s Fatal Inconsistency with the President's Military Order	5 Jan 06	XXXX	XXXXX	• Motion filed 5 Jan 06 • A. Ruling of the PO	OR – 37 A - 39
D 3 – Motion in Opposition to the Presiding Officer's Order to Counsel to Appear at an Off-the-Record Conference Pursuant to MCI No. 8, Paragraph 5	10 Jan 06	XXXXX	XXXXX	• Motion filed 10 Jan and denied. Defense to provide APO with missing attachments. • A. Motion denied by PO	OR – 40 A - 41
D 4: Motion for Order Prohibiting Prosecution From Making Inappropriate Extrajudicial Statements and Requiring Prosecution to Take Steps to Remediate Past Inappropriate Statements	12 Jan 06	12 Jan 06		• Motion filed. • A. Response filed. • Motion denied on the record, Jan 2006 session.	OR – 55 A - 60
				•	
				•	

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE

Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
2	**Protective Order 1**	1	11 Jan 06	• Prosecution Request - Protection of Identities of Investigators and Interrogators. • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed	**ORIG – 26** **A – 33** **B - 45**
3	**Protective Order 3**	3	11 Jan 06	• Prosecution Request - FOUO - Law Enforcement sensitive • A. Defense Objection and new, suggested order. (DC address more than one order in the email; see highlighted portions of the filing) • B Protective Order signed and issued.	**ORIG – 27** **A – 32** **B - 65**
4	**Protective Order 2**	2	11 Jan 06	• Prosecution Request - Protection of Identities of all witnesses • A. Defense objection to issuing order at all. (DC address more than one order in the email; see highlighted portions of the filing) • B. Order signed and issued.	**ORIG – 28** **A – 34** **B - 46**

From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO

To: [redacted]

CC:

Subject: FW: SCHEDULING FOR KHADR APRIL SESSION

Date: Tuesday, April 04, 2006 11:12:32 AM

Attachments:

[redacted]

Take this entire email, save it as Adobe, prepare it as the next RE in order in US v. Khadr, and return it to me via email.

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Sent: Tuesday, April 04, 2006 10:46 AM
To: [redacted]

Subject: RE: SCHEDULING FOR KHADR APRIL SESSION
The Presiding Officer grants the defense's request. The session scheduled for 4 April 06 is cancelled. The first session in US v Khadr this trial term will be held at 0900, 5 April 06.

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: [redacted]
Sent: Tuesday, April 04, 2006 10:29 AM
To: [redacted]
Subject: RE: SCHEDULING FOR KHADR APRIL SESSION
Sir,
(1) The Prosecution requests clarification from the Defense regarding their meeting with the accused and whether there was sufficient time available to discuss today's proceedings.
(2) The email below requests a delay for two reasons: (1) inadequate time to meet with the accused; and (2) Defense need for additional time to prepare to conduct the business scheduled for today's session. I do not oppose a request for the first reason, however oppose any delay requested for the second.
(3) I fully understand that their are logistical challenges associated with counsel visits to detainees at Guantanamo Bay and do not oppose reasonable requests for delay caused as a result of insufficient time to meet with your client. Having said that, based on my conversation with the SJA, it appears there was at least an additional 50 minutes the Defense Counsel could have used to meet with the accused in anticipation of today's session.
(4) Upon receipt of the email below, I called the SJA to determine why the Defense was not allowed to meet with their client as scheduled. They confirmed that the accused was not ready to be seen until 1450; however, at this point could not explain the cause for the delay. They also confirmed that counsel met with the accused and signed out from Camp Echo at 1610, despite being scheduled to meet with the accused until 1700. Is there any reason why all of the allotted time was not used?
(5) I oppose any delay request for additional time to prepare for the business previously scheduled for today's hearing. We are scheduled to litigate two motions and conduct voir dire of the Presiding Officer. The Defense has had ample time to prepare for this hearing. The Defense filed D-2, now D-7 on 5 January 2006, initially requesting to litigate the motion during the 11 January trial term. That motion was not heard during that session, but was later added to the

filings inventory on 23 Feb 2006. D-6 was filed on 28 Feb 2006. The Government provided a timely response to each motion. The Defense did not file a reply to either response.
(6) Voir Dire of the Presiding Officer was originally scheduled to be conducted during the 11 January term and during that session the Defense elected to reserve voir dire for a subsequent session. You were detailed to the case on 20 Jan 2006 and has had significant time to prepare to conduct voir dire of the Presiding Officer.
V/R,
Major [redacted]

-----Original Message-----
From: Vokey, Colby C LtCol USSOUTHCOM JTFGTMO
Sent: Tuesday, April 04, 2006 2:13 AM
To: Chester, Robert Col USSOUTHCOM JTFGTMO
Cc: Hodges, Keith H CIV USSOUTHCOM JTFGTMO; [redacted]
Subject: SCHEDULING FOR KHADR APRIL SESSION
Colonel,
The defense for Khadr respectfully requests that the hearings on our case do not begin until Wednesday 5 April, as originally scheduled. We are not ready to proceed and need more time to prepare and discuss these proceedings with our client.
When the trial schedule was originally set, it was determined that the hearing in our case would be heard only on Wednesday 5 April. However, due apparently to scheduling concerns of other commissions cases being heard this same week, Mr. Hodges proposed that we start our hearing on Tuesday afternoon, 3 April. The defense objected, based on the need to confer with our client, discuss the proceedings amongst all 4 counsel, and otherwise prepare for the hearing. Mr. Hodges informed us that the Khadr hearing would start on 4 April, over the defense objection.
It has become clear that we are not ready to proceed on the afternoon of 3 April. As I am writing this at 0200 on 3 April, the defense team is still working on preparing for all scheduled tasks and must have additional time to consult with our

client before going on the record. Our schedule since arriving on Guantanamo and the corresponding logistal arrangements have compounded the problem of the team adequately preparing. We didn't arrive in our quarters until 2230 on Sunday 2 April, after traveling all day. On Monday 3 April, we were required to attend a briefing at the commissions building at 0930. After this time, various members of our team were required to accomplish several administrative tasks incident with our representation and participation in proceedings. At 1300, we were scheduled to meet with our client. However, similar to the difficulties I encountered in my first visit with my client in February, we were again prevented from seeing our client at the prearranged and previously coordinated time on Monday. I had previously sent an email to LCDR [redacted] and others at the JTF SJA office to ask for specific visitation days and time while the Khadr defense team was at the Naval Station. It was agreed that we would be permitted to visit with our client at 1300 on 3 April. I spoke with both LCDR [redacted] and Mr. Hodges about this matter well in advance. I was told that my visit requests were approved. However, Omar Khadr was not ready for consultation at Camp Echo at 1300. The defense team had to wait two hours and did not get to visit our client until approx 1500.

The result was another visit with our client of about two hours and inadequate time to prepare and discuss the current session.

In order to be properly prepared to handle the scheduled tasks and issues at the present session, we request that our hearings do not begin until the morning of 4 April.

Additionally, I was told that visits could not be requested on days in which a hearing is also scheduled. As we are requesting that the actual hearings begin on 5 April and because we are not scheduled for visitation on 4 April, we also request that the presiding officer assist the defense in facilitating a visit on 4 April our client.

Due to time restraints, we request and answer as soon as possible and that the answer be provided to ALL recipients

V/R

LtCol Vokey

Selected Detailed Defense Counsel

KHADR
REVIEW EXHIBIT 97

Review Exhibit (RE) 97 is a transcript, translated on July 12, 2005.

RE 97 consists of 3 pages.

The Defense have requested that RE 97 not be released on the Department of Defense Public Affairs web site. In this instance the Accused's right to a fair trial outweighs the public interest in this information.

RE 97 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 97.

//signed//

M. Harvey
Chief Clerk of Military Commissions

KHADR
REVIEW EXHIBIT 98

Review Exhibit (RE) 98 is a Criminal Investigative Task Force (CITF) Report of Investigative Activity, dated Apr. 20, 2004. It consists of the witness interview of a Major who was present when the Accused was captured. It describes some evidence seized on July 27, 2002, near a particular village in Afghanistan.

RE 98 consists of 2 pages.

The Defense have requested that RE 98 not be released on the Department of Defense Public Affairs web site. In this instance the Accused's right to a fair trial outweighs the public interest in this information.

RE 98 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 98.

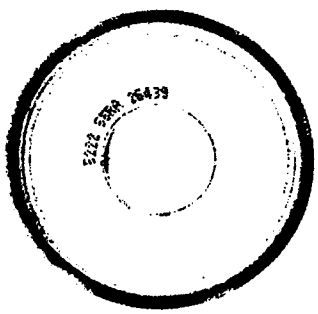
//signed//

M. Harvey
Chief Clerk of Military Commissions

FOR OFFICIAL USE ONLY//LAW ENFORCEMENT SENSITIVE

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CHIEF PROSECUTOR

U.S. V. KHADR



REVIEW EXHIBIT_____

RE 99 (Khadr)
Page 1 of 1

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Prosecution
Proposed Trial Schedule

April 5, 2006

1. The Prosecution proposes the following motion schedule:

   a. 21 April 2006: Legal motions due.

   b. 5 May 2006: Responses to legal motions due.

   c. 12 May 2006: Replies to legal motion responses due.

   d. 22 May 2006: Legal motion hearing convenes. (If a session can be scheduled)

   e. 21 July 2006: Evidentiary motions due.

   f. 4 Aug 2006: Responses to evidentiary motions due.

   g. 11 Aug 2006: Replies to evidentiary motions due.

   h. 21 Aug 2006: Evidentiary motion hearing convenes.

   i. 11 Sept 2006: Trial on the Merits (Prosecution case estimated to last 10 days) Prosecution Sentencing Case (if necessary) estimated to last ½ day.

2. The point of contact for this schedule is the undersigned.

[redacted]
Major, U.S. Marine Corps
Prosecutor

excuse me mr. Jugde im being punished for exersizing my wright and being cooperative in perticepating in this milivtery Commision. for that i say with my respect to you and every body eles hear that im boycotting thes perseduns untel i be treted humainly and fair

8-5 Conference Call: Rick, Colby, Muneer, [redacted] Chester – DRAFT by MA, rjw's in Track Changes

6:00 pm

PO: 29 May for the next hearing is too long.

CV: Why?

PO: Because I said it was. Right now, the hearing of March 27 is on. I also note that Profs. Ahmad and Wilson have noted conflicts with classes, speaking engagements, etc. My view is that we can't wait for everything to clear.

PO: Suggests moving initial law motions hearing from 27 March to week of 3 April.

JG: That works for the prosecution

CV: Continuance request was put in for two reasons: one was scheduling conflicts, but the other is the ability to be ready for this. I was only able to get in to see my client for about two hours ... I feel woefully inadequate at to move forward at this point. I haven't gone through the discovery at this point.

CV: Why are we in such a rush to get to the next trial? If there's a speedy trial issue, I'll certify that the delay right now is attributable to the defense. There is a lot of discovery that I haven't been able to go through. 29 discs in total, some are video, some are text. (The discs were shown to PO.) Some we have been unable to open. We haven't been able to review much discovery yet, through no fault of Maj. [redacted] We've had last week and today to go through all of this. There's more discovery that Maj. [redacted] will be producing. There's also classified discovery that the prosecution tried to serve on the defense in DC, but the office there lacks a safe to keep classified information.

PO: What has happened to the classified discovery? Has it been mailed?

JG: Yes, it was mailed.

PO: Is there anything precluding you from being in Guantanamo the week of 3 April?

CV: I can be there physically, but I won't be prepared to argue motions. I have a training event prior to that time.

PO: Training events that conflict with our calendar are a low priority to me. Last time we were in Guantanamo Mr. Ahmad argued very forcefully that Mr. Khadr had been keep incarcerated and denied a speedy and fair trial. I want to give Mr. Khadr his day in court.

PO: I want to get some initial things resolved on the record. One is representation. We need to resolve what Prof. Wilson's status is as civilian counsel.

CV: I don't understand the urgency...

PO: My requirement is an expeditious trial. You've said you've had difficulty getting in to see your client. I think you need to file a motion on this before I can do this.

PO: Prof. Ahmad has forcefully argued that Mr. Khadr is being held incommunicado, and I agree; we need to get this going.

MA: I did argue that Omar has been held incommunicado for 3 ½ years. But I don't think that that is cured by forcing the defense to move forward before we are ready.

PO: I can't do anything about the last three or four years. But justice delayed is justice denied. We should move forward smartly now. Representation issue (counsel filing "under protest" and Canadian counsel), voir dire, discovery issue. To the

Review Exhibit 102 (Khadr)
Page 1 of 3

extent we can, come up with a more firm trial schedule. As I read Col. Vokey's motion, I have considerable concern about juggling everyone's schedules. That's why I feel some sense about getting down to Guantanamo sooner rather than later. I'm concerned with Mr. Khadr's rights to due process and fair trial. Seeing the client should be no problem at all, and should require only 72 hour notice, according to what I understand to be the rules. I'm feeling some pressure to get going with what I've been tasked to do.

CV: Who's putting on the pressure?

PO: The President and the Secretary of Defense. That is my tasking order.

CV: So what if we go down to Guantanamo the week of 3 April to conduct voir dire, deal with discovery motion, and deal with the abatement motion?

JG: I'm not aware of an unresolved motion pending other than the discovery order motion.

PO: There were two motions filed by JJ—one for continuance, one for abatement. I assume you want to resurrect the abatement?

CV: Yes.

PO: Let's consider that a motion that needs to be resolved. Pros. will have to file a response.

PO: Wants to try to resolve some of the "canned" or "standard" common motions dealing with jurisdiction. Want to suggest a second hearing date the 5th-9th of June for additional law motions, and perhaps start in on evidentiary motions. This would be in lieu of the session currently set for 22nd-26th of May.

RW: If I'm not mistaken, the voir dire motion raises the question of whether to voir dire all members at once. It sounds like you have in mind voir dire of you alone.

PO: That's correct. Parties will have opportunity for voir dire of the other members when we are closer to trial.

MA: Our motion for abatement is a threshold matter that needs to be resolved before voir dire can be done. If we succeed on our motion, then voir dire of the PO can't be done unless all of the other members are present.

PO: I disagree with your conclusion. If I were one of the parties I would want to be assured of the impartiality of the PO, and then move forward to the legal issues.

MA: Ours is a jurisdictional challenge. It's a challenge to the competence of the members to sit at all.

PO: I want to assure that you have a PO who is impartial.

RW: I want to raise a caution about your reference to "canned" or "standard" motions. Nothing we file will be of that nature, and that term seems inappropriate, in that these military commissions are unprecedented.

PO: What I'm referring to is that we've seen similar motions in the other four MC cases. I also assume that RW and MA have addressed some of the constitutional issues in the habeas litigation. That's not to say that I'm not going to consider each motion in its entirety. I intend to do that.

MA: I don't know that we'll have the kinds of legal motions the week of 3 April that you have in mind. While Rick and I have been on the habeas case for some time, the commission issues only became part of the habeas case when Omar was charged, and none of the issues in federal court deal directly with questions of the jurisdiction of military commissions.

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PO: I understand. I think whatever motions we can get addressed in February we should. In the April session, we can deal with Abatement, voir dire, discovery and any counsel issues on representation. Will JJ stay on the case?

CV: JJ is on the case.

JG: I assume that some motions will be filed 2/24, and that we'll litigate those the week of 3 April.

PO: If the defense has other motions it can file then it should. So, schedule confirmed for hearings the week of 3 April and the week of 5 June.

JG: Asks that the parties be directed to submit proposed due dates for evidentiary hearings and for trial. [Some discussion here of Feb. 28 filing?]

CV: Let's just do that during the week of 3 April.

PO: We'll plan on setting remainder of motions sessions and set trial schedule, to the extent we can, during the 3 April session.

PO: Wants from CV written answers re. nature of trips and school/trainings on his schedule.

CV: Will provide answers in writing. Travel to Afghanistan and Canada. Law of War class in Charlottesville.

PO: I can tell you the class was well-taught but not on point. You're welcome to go to it. It primarily dealt with targeting and things like that.

PO: You've indicated a couple of difficulties you've encountered. I think Maj. [redacted] is more than willing to assist. If not, I have some sway with people. If you're having problems, it's better to ask for help earlier.

PO: Will put out order with schedule later today. When we get down to Gtmo in April, I do want to set a schedule through trial.

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The New York Times

November 30, 2001 Friday
Late Edition - Final

SECTION: Section A; Column 2; Editorial Desk; Pg. 27

LENGTH: 763 words

HEADLINE: Martial Justice, Full and Fair

BYLINE: By Alberto R. Gonzales; Alberto R. Gonzales is counsel to President Bush.

DATELINE: WASHINGTON

BODY:

Like presidents before him, President Bush has invoked his power to establish military commissions to try enemy belligerents who commit war crimes. In appropriate circumstances, these commissions provide important advantages over civilian trials. They spare American jurors, judges and courts the grave risks associated with terrorist trials. They allow the government to use classified information as evidence without compromising intelligence or military efforts. They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.

And they can consider the broadest range of relevant evidence to reach their verdicts. For example, circumstances in a war zone often make it impossible to meet the authentication requirements for documents in a civilian court, yet documents from Al Qaeda safe houses in Kabul might be essential to accurately determine the guilt of Qaeda cell members hiding in the West.

Some in Congress and some civil libertarians remain skeptical of the military commissions. Their criticism, while well-intentioned, is wrong and is based on misconceptions about what the president's order does and how it will function.

The order covers only foreign enemy war criminals; it does not cover United States citizens or even enemy soldiers abiding by the laws of war. Under the order, the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States. The president must determine that it would be in the interests of the United States that these people be tried by military commission, and they must be chargeable with offenses against the international laws of war, like targeting civilians or hiding in civilian populations and refusing to bear arms openly. Enemy war criminals are not entitled to the same procedural protections as people who violate our domestic laws.

Military commission trials are not secret. The president's order authorizes the secretary of defense to close proceedings to protect classified information. It does not require that any trial, or even portions of a trial, be conducted in secret. Trials before military commissions will be as open as possible, consistent with the urgent needs of national security. The specter of mass secret trials, as depicted by critics, is not an accurate reflection of the order or the president's intent.

The order specifically directs that all trials before military commissions will be "full and fair." Everyone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense. The American military justice system is the finest in the world, with longstanding traditions of forbidding command influence on proceedings, of providing zealous advocacy by competent defense counsel, and of procedural fairness. Military commissions employed during World War II even acquitted some German and Japanese de-

fendants. The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system.

The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

Military commissions are consistent with American historical and constitutional traditions. Confederate agents disguised as civilians traveling to New York to set it afire were tried by military commission. Nazi saboteurs who came ashore on Long Island during World War II disguised as civilians and intending to attack American war industries were tried before military commissions. The use of such commissions has been consistently upheld by the Supreme Court.

Military commissions do not undermine the constitutional values of civil liberties or separation of powers; they protect them by ensuring that the United States may wage war against external enemies and defeat them. To defend the nation, President Bush has rightly sought to employ every lawful means at his disposal. Military commissions are one such means, and their judicious use will help keep Americans safe and free.

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LOAD-DATE: November 30, 2001

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Compensation for Immigration Judges. Act Sept. 30, 1996, ◆ P.L. 104-208, Div C, Title III, Subtitle F, § 371(c), 110 Stat. 3009-645 (effective 90 days after enactment as provided by § 371(d) of such Act), provides:

"(1) In general. There shall be four levels of pay for immigration judges, under the Immigration Judge Schedule (designated as IJ-1, 2, 3, and 4, respectively), and each such judge shall be paid at one of those levels, in accordance with the provisions of this subsection.

"(2) Rates of pay.

(A) The rates of basic pay for the levels established under paragraph (1) shall be as follows:

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IJ-1........70% of the next to highest rate of basic pay for the
            Senior Executive Service
  IJ-2........80% of the next to highest rate of basic pay for the
            Senior Executive Service
  IJ-3........90% of the next to highest rate of basic pay for the
            Senior Executive Service
  IJ-4........92% of the next to highest rate of basic pay for the
            Senior Executive Service.
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"(B) Locality pay, where applicable, shall be calculated into the basic pay for immigration judges.

"(3) Appointment.

(A) Upon appointment, an immigration judge shall be paid at IJ-1, and shall be advanced to IJ-2 upon completion of 104 weeks of service, to IJ-3 upon completion of 104 weeks of service in the next lower rate, and to IJ-4 upon completion of 52 weeks of service in the next lower rate.

"(B) Notwithstanding subparagraph (A), the Attorney General may provide for appointment of an immigration judge at an advanced rate under such circumstances as the Attorney General may determine appropriate.

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UNITED STATES v. SALIM AHMED HAMDAN – Case No. 04-0004	**Appointing Authority Decision on Challenges for Cause**
UNITED STATES v. DAVID MATTHEWS HICKS – Case No. 04-0001	Decision No. 2004-001 October 19, 2004

Initial hearings were held in each of the above cases at Guantanamo Bay, Cuba, on August 24 and 25, 2004, respectively, during which voir dire was conducted.[1] In both cases, counsel for both sides reviewed detailed written questionnaires completed by each commission member, conducted voir dire of the commission as a whole, and then conducted extensive individual voir dire of the presiding officer, each of the four commission members, and the one alternate member.[2] Some of the commission members were also individually questioned by counsel in closed session so that classified matters could be examined.[3] In both the *Hamdan* and *Hicks* cases, defense counsel challenged the Presiding Officer, three of the four commission members, and the alternate commission member. During the hearings, the prosecution opposed all the challenges in both cases. However, in a subsequent brief filed by the Chief Prosecutor, the prosecution modified their position and no longer opposes the challenges for cause against Colonel (COL) B (a Marine),[4] Lieutenant Colonel (LTC) T, and LTC C.

[1] The initial hearing in *United States v. al Bahlul*, Case No. 04-0003, was held on August 26, 2004, at Guantanamo Bay, Cuba. The proceedings in that case were suspended prior to voir dire to resolve the accused's request to represent himself. The initial hearing in *United States v. al Qosi*, Case No. 04-0002, was held on August 27, 2004, at Guantanamo Bay, Cuba. Voir dire in that case is scheduled to be conducted in November 2004.

[2] By comparison, in the Nazi Saboteur Military Commission conducted during World War II, defense counsel asked only two questions of the commission as a whole and conducted no individual voir dire. There were no challenges for cause. *See* Transcript of Proceedings before the Military Commissions to Try Persons Charged with Offenses Against the Law of War and the Articles of War, Washington D.C., July 8-31, 1942, transcribed by the University of Minnesota, 2004, *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm at pp. 13-14.

[3] To what extent voir dire is conducted during any military commission is a matter within the discretion of the Presiding Officer. "The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate . . . [and shall ensure that] any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member." DoD Military Commission Instruction No. 8, "Administrative Procedures," paragraph 3A(2) (Aug. 31, 2004) [hereinafter MCI No. 8]. The Presiding Officer permitted extensive, wide-ranging voir dire in both of these cases. There was no objection by any counsel that the Presiding Officer impeded in any way their ability to conduct full and extensive voir dire of all the members, including the Presiding Officer.

[4] The final commission member, COL B (an Air Force officer), was not challenged by either side in either case. All further references to COL B herein refer to COL B, the Marine.

In each case, the Appointing Authority considered the trial transcript, the written briefs of the parties, the written questionnaires completed by the members, and the written recommendations of the Presiding Officer. While each case is decided on the record of trial in that case, this joint decision is provided because of the close similarities in the voir dire of the members and the arguments of counsel in both cases. Additionally, defense counsel from the *al Qosi* case has also filed a brief concerning the proper standard for the Appointing Authority to apply when deciding challenges for cause.

Military Commission Procedural Provisions on Challenges for Cause

The Appointing Authority appoints military commission members "based on competence to perform the duties involved" and may remove members for "good cause." DoD Directive No. 5105.70, "Appointing Authority for Military Commissions," paragraph 4.1.2 (Feb. 10, 2004) [hereinafter DoD Dir. 5105.70]. *See also* DoD Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism," Section 4A(3) (Mar. 21, 2002) [hereinafter MCO No. 1]; MCI No. 8 at paragraph 3A(1). To be qualified to serve as a member or an alternate member of a military commission, each person "shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty." MCO No. 1 at Section 4A(3). *Compare* Article 25(a), Uniform Code of Military Justice, 10 U.S.C. § 825(a) [hereinafter UCMJ].

The Presiding Officer may not decide challenges for cause but must "forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause. While awaiting the Appointing Authority's decision on such matter, the Presiding Officer may elect either to hold proceedings in abeyance or to continue."[5] MCI No. 8 at paragraph 3A(3). In the *Hamdan* and *Hicks* cases, consistent with this authority, the Presiding Officer has scheduled due dates for motions, motion hearing dates, and tentative trial dates pending the Appointing Authority's decision on these challenges.

"In the event a member (or alternate member) is removed for good cause, the Appointing Authority may replace the member, direct that an alternate member serve in the place of the original member, direct that proceedings simply continue without the member, or convene a new commission." MCI No. 8 at paragraph 3A(1).

The term "good cause" is not defined in any of these provisions but is defined in the Review Panel instruction as including, but not limited to, "physical disability, military exigency, or other circumstances that render the member unable to perform his duties."

[5] On September 15, 2004, the Appointing Authority sent the following email to the Presiding Officer: "Please forward your observations and recommendations relating to challenges for cause." That same day, the Presiding Officer provided written recommendations concerning the recommended standard for deciding challenges for cause and his recommendations on the challenges against each member in the *Hamdan* and *Hicks* cases.

DoD Military Commission Instruction No. 9, "Review of Military Commission Proceedings," paragraph 4B(2) (Dec. 26, 2003). This is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court. *See* Manual for Courts-Martial, United States, Rules for Courts-Martial 505 (2002) [hereinafter RCM].

Parties' Positions Concerning the Standard for Determining Challenges for Good Cause

At the request of the Presiding Officer, defense counsel in *Hamdan*, *Hicks*, and *al Qosi*, as well as the Chief Prosecutor, filed briefs concerning the appropriate standard for the Appointing Authority to apply when deciding challenges for "good cause." The defense briefs in *Hicks* and *al Qosi* advocate the adoption of the standard set forth in RCM 912(f) including the "implied bias" provision which states that a member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the [military commission] free from substantial doubt as to legality, fairness, and impartiality." RCM 912(f)(1)(N). While making some different arguments in support of their position, defense counsel in *Hicks* and *al Qosi* advocate that the RCM 912(f)(1)(N) court-martial standard should be applied without change in military commissions. Under this standard, implied bias is determined via a supposedly objective standard, the test being whether a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding. *See United States v. Strand*, 59 M.J. 455, 458-59 (2004). Defense counsel in *Hamdan* agree that the RCM 912(f)(1)(N) court-martial standard should be applied to military commissions, but argue that the reasonable member of the public must be taken from the international community.

The brief filed by the Chief Prosecutor recommends the following standard be adopted: "A member shall be disqualified when there is good cause to believe that the member cannot provide the accused a full and fair trial, or the member's impartiality might reasonably be questioned based upon articulable facts."

The Presiding Officer recommends that a challenge for cause should be granted "if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an 'implied bias' standard in the relevant documents establishing the Commissions." (Mem. for Appointing Authority, Military Commissions at paragraph 2, Sept. 15, 2004.)

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal practice, and under international practice when deciding the appropriate challenge standard for military commissions.

Applicability of the Uniform Code of Military Justice and the Manual for Courts-Martial to Military Commissions

As explained below, while some of the provisions of the UCMJ expressly apply to military commissions, none of the provisions of the Manual for Courts-Martial, including the implied bias standard endorsed by defense counsel, apply to military commissions. Article 21 of the UCMJ provides:

> § 821. Art. 21 Jurisdiction of courts-martial not exclusive
>
> The provisions of this chapter conferring jurisdiction upon courts-marital do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[6]

UCMJ art. 21. Article 36 of the UCMJ states:

> § 836. Art. 36 President may prescribe rules
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, *military commissions* and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter* [10 U.S.C. §§ 801-946].
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

UCMJ art. 36 (emphasis added). In 1990, the phrase "and shall be reported to Congress" was deleted from the end of subsection (b). *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Section 1301, 104 Stat. 1301 (1990).

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[6] As recently as November 22, 2000, less than one year before the 9/11 attacks, Congress again recognized the independent jurisdiction of military commissions. *See* Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523 (adding a section entitled "Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States," 18 U.S.C. § 3261 (2000)). 18 U.S.C. § 3261(c) states that "[n]othing in this chapter [18 U.S.C. §§ 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." *Id.*

Consistent with this Congressional authority, on November 13, 2001, the President entered the following finding:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833, Section 1(f) (Nov. 16, 2001) [hereinafter President's Military Order].

Accordingly, the Manual for Courts-Martial does not apply to trials by military commissions because of the congressionally authorized finding in the President's Military Order. However, the President's statutory authority to promulgate different trial rules for military commissions is not unlimited. Military commission trial procedures must comply with two statutory conditions contained in the Uniform Code of Military Justice. First, all such rules and regulations shall be "uniform insofar as practicable." UCMJ art. 36(b).

Second, any such rule or regulation "may not be contrary to or inconsistent with" the Uniform Code of Military Justice. UCMJ art. 36(a). Most of the UCMJ's provisions specifically apply to courts-marital only, but some also expressly apply to military commissions as well. For example, Articles 21 (jurisdiction), 28 (court reporters and interpreters), 37(a) (unlawful command influence), 47 (refusal to appear or testify), 48 (contempts), 50 (admissibility of records of courts of inquiry), 104 (aiding the enemy), and 106 (spies) all expressly apply to military commissions.

Article 41 of the UCMJ discusses challenges for cause, but is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for "cause." *See* UCMJ art. 41(a)(1). Article 29 of the UCMJ provides that no member of a court-martial may be excused after the court has been assembled "unless excused as a result of a challenge, excused by the military judge *for physical disability or other good cause*, or excused by order of the convening authority for good cause." UCMJ art. 29(a) (emphasis added).

In historical military jurisprudence, a general statement or assertion of bias was not a proper challenge. The challenge had to allege specific facts and circumstances demonstrating the basis of the alleged bias. *See generally* William Winthrop, *Military Law and Precedents* 207 (Government Printing Office 1920 reprint) (1896). Challenges

"for favor," as implied bias challenges were historically known, did not, by themselves, imply bias.

> [T]he question of their sufficiency in law being wholly contingent upon the testimony, *which may or may not, according to the character and significance of all the circumstances raise a presumption of partiality*. Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute [actual bias]; the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what . . . which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not 'in a state of neutrality' between the parties.

Id. at 216 (emphasis added). In such cases, the question of whether the member is or is not biased "is a question of *fact* to be determined by the particular circumstances in evidence." *Id.* at 216-17 (emphasis in original).

Challenges for Cause in United States Federal Courts

In federal practice, the seminal case on implied bias is *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (boldface added):

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury **capable and willing to decide the case solely on the evidence before it**, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

In an often cited concurring opinion, Justice O'Connor writes that:

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the

> juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Id. at 222.

The doctrine of implied bias is "limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Brown v. Warden*, No. 03-2619, 2004 U.S. App. LEXIS 13944, at 3 (3rd Cir. July 6, 2004 unpublished) (quoting *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). "The implied bias doctrine is not to be lightly invoked, but 'must be reserved for those extreme and exceptional circumstances that leave serious question whether the trial court subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.'" *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1261 (2d Cir. 2000) (quoting *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996)).

Military courts-martial practice also purports to follow the *Smith* Supreme Court precedent, with the highest military appellate court concluding that "implied bias should be invoked rarely." *See United States v. Warden*, 51 M.J. 78, 81 (2000); *see also United States v. Lavender*, 46 M.J. 485, 488 (1997) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). In practice, however, the U. S. Court of Appeals for the Armed Forces has been more liberal in granting implied bias challenges than the various U.S. Federal Circuit Courts of Appeals. But even in courts-martial, military appellate courts look at the "totality of the factual circumstances" when reviewing implied bias challenges. *See United States v. Strand*, 59 M.J. 455, 459 (2004).

The American Bar Association recently proposed a minimum standard for deciding challenges for good cause:

> At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, or may be unable or unwilling to hear the subject case fairly and impartially. . . . In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

American Bar Association, Standards Relating to Jury Trials, Draft, September 2004.

International Standards for Challenges for Cause

International law generally provides for the right of an accused to an impartial tribunal. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) statutorily establish impartiality as a judicial requirement. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 13, U.N. Doc. S/25704, 32 ILM 1159, 1195 (May 3, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 12, U.N. Doc. S/Res/955, U.N. SCOR 3453, 33 ILM 1598, 1607 (Nov. 8, 1994). The Rules of Evidence and Procedure of both the ICTY and ICTR state that "[a] judge may not sit on a trial . . . in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 15, U.N. Doc. IT/32/Rev. 32 (Aug. 12, 2004); Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 15, U.N. Doc. ITR/3/REV. 1 (June 29, 1995).

Several international treaties and conventions recognize the right to an impartial tribunal. The European Convention on Human Rights and the International Covenant on Political and Civil Rights guarantee the accused a fair trial and recognize the right to an impartial tribunal. In nearly identical language, the standards in both documents require a criminal tribunal to be fair, public, independent, and competent. *See* European Convention on the Protection of Human Rights and Fundamental Freedoms, art. 6, Section 1, *opened for signature*, 213 UNTS 221 (Nov. 4, 1950); International Covenant on Political and Civil Rights, art. 14, Section 1, 999 UNTS 171 (Dec. 16, 1966).

The European Court of Human Rights has reviewed numerous cases for alleged violations of the right to an impartial tribunal or judge. In evaluating impartiality, the Court consistently emphasizes that judges and tribunals must appear to be impartial. *Piersack v. Belgium*, Series A, No. 53 (Oct. 1, 1982). In *Piersack v. Belgium*, the Court noted that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. *Id.* at para. 30(a). The European Court of Human Rights affirmed this consideration in *Gregory v. United Kingdom*, stating that "[t]he Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public . . . ." *Gregory v. United Kingdom*, 25 Eur. H.R. Rep. 577, para. 43 (Feb. 25, 1997). As a result of an overriding need to maintain an appearance of impartiality, national legislation often establishes specific relationships or perceived conflicts that disqualify a judge on the basis of appearances rather than an objective finding that a judge is indeed impartial.

In evaluating whether there is an appearance of impartiality that gives rise to a challenge of a judge or juror, the European Court of Human Rights noted that lack of impartiality includes situations where there is a "legitimate doubt" that a juror or judge can act impartially. *Piersack*, Series A, No. 53 at para. 30. Further, it is necessary to "examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury . . . ." *Gregory*, 25 Eur. H.R. Rep. at para. 45. Despite this seemingly expansive approach, the European

Court of Human Rights has ruled consistently that a judge is presumed to be impartial unless proven otherwise. *LeCompte, van Leuven and De Meyeres v. Belgium*, Series A, No. 43 (June 23, 1981). Thus, as a practical matter, it is the rare case in which the impartiality of a judge is successfully challenged on the basis of a judge's relationship to others when such relationship is not specifically enumerated as a disqualifying factor under national legislation.

The Appeals Chamber for the International Criminal Tribunal for Rwanda has exhaustively analyzed the European Court of Human Rights cases, as well as cases from common law states, and developed the following standard to interpret and apply the concept of impartiality:

> [A] Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> > A. A judge is not impartial if shown that actual bias exists.
> > B. There is an unacceptable appearance of bias if:
> > i. a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . ; or
> > ii. the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.

Prosecutor v. Furundzija, para. 189, Case No. I IT-95-17/1-A, Judgment, (July 21, 2000).

The Appeals Chamber noted that an informed observer is one who takes into account the oath, as well as any training and experience of the juror. On the basis of this test, the Appeals Chamber found no violation, holding that the judge's membership in an international organization was one of the very factors that qualified her as a judge at the Tribunal and thus such membership could not be the basis for a claim of bias. The Chamber also noted that judges may have personal convictions that do not amount to bias absent other factors. *Id.* at para. 203.

Appointing Authority Standard for Deciding Challenges for Cause

The President's Military Order establishes the trial standard that military commissions will provide "a full and fair trial, with the military commission sitting as the triers of both fact and law." President's Military Order at Section 4(c)(2). Considering all of the above, the Appointing Authority will apply the following standard, which includes a limited implied bias component, when deciding challenges for cause against any member of a military commission:

> Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

In applying this standard, a member should be excused if the record establishes a reasonable and significant doubt concerning his or her ability to act fairly and impartially. Additionally, the following factors will be considered, although the existence of any one of these factors is not necessarily an independent ground warranting the granting of a challenge and no one factor necessarily carries more weight than another. In each case the challenge will be decided based upon the above standard, taking into account any of these factors that may be applicable and considering the totality of the factual circumstances in the case.

(1) Has the moving party established a factual basis to support the challenge?

(2) Does the non-moving party oppose the challenge?

(3) What recommendation, if any, did the Presiding Officer make concerning the challenge? *See* MCI No. 8 at paragraph 3A(3).

(4) Does the record demonstrate that the challenged member possesses sufficient age, education, training, experience, length of service, judicial temperament, independence, integrity, intelligence, candor, and security clearances, and is otherwise competent to serve as a member of a military commission? *See* MCO No. 1 at Sections 4A(3)-(4); DoD Dir. 5105.70 at paragraph 4.1.2; UCMJ art. 25(d)(2).

(5) Does the record establish that the challenged member is able to lay aside any outside knowledge, association, or inclination, and decide the case fairly and impartially based upon the evidence presented to the commission? *See Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961) (citations omitted).

Examples of good cause that would normally warrant a member's removal from a military commission include situations where the member does not meet the qualifications to sit on or has not been properly appointed to a military commission; has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged; has become physically disabled; or has intentionally disclosed protected information from a referred military commission case without proper authorization.

Consideration of Individual Challenges

LTC C

The defense challenges to LTC C are based upon his ongoing strong emotions and anger because of 9/11 and his real and present apprehension that his family may be harmed if he participates in these commissions. At trial, the prosecution opposed this challenge. However, the post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer believes that there is "some cause" to grant a challenge against LTC C because his responses would provide a reasonable person cause to doubt his ability to provide an impartial trial.

During his voir dire in *Hamdan*, LTC C acknowledged that he indicated in his written questionnaire that he had a desire to seek justice for those who perished at the hands of the terrorists, that he was very angry about the events of 9/11, and that he still had strong emotions about what happened. LTC C further stated that he believed terrorist organizations would seek out both he and his family for revenge simply because of his participation in these commissions. He also stated that at one point he held the opinion that the persons being detained at Guantanamo Bay were terrorists.

During his voir dire in *Hicks*, LTC C stated that he would try to put his emotions aside and look at the case objectively. He reaffirmed that he had participated in discussions with other soldiers where he probably stated that all of the detainees at Guantanamo Bay were terrorists, but that in retrospect that was no longer his opinion.

LTC C's past statements concerning the detainees at Guantanamo, coupled with his ongoing strong emotions concerning the 9/11 attacks, create a reasonable and significant doubt as to whether he could lay aside his emotions and judge the evidence presented in these cases in a fair and impartial manner. Accordingly, based on the totality of the factual circumstances, the challenge for cause against LTC C will be granted.

COL S

On 9/11, COL S [redacted] COL S

attended his funeral and met with his family. COL S also visited Ground Zero about two weeks after the attack [redacted]

The defense challenges to COL S are based upon his emotional reaction when visiting Ground Zero as well as his attendance at the funeral [redacted] The prosecution opposed this challenge at trial. The post-hearing brief filed by the Chief Prosecutor also opposes this challenge, without elaboration.

The Presiding Officer's written recommendation is that there is no cause to grant a challenge against COL S:

> His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL S [] while he was discussing the death of [redacted] he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.

In the *Hamdan* record, COL S described his reaction to attending the funeral of [redacted]

> I have been a battalion commander. I have been a regimental commander. I have been in the Marine Corps 28 years. It is not the first Marine that, unfortunately, that I have seen die, whether he was on or off duty in the Marine Corps. The death of every Marine I have known or served with has a deep affect on me, but it is no different that -- that Marine's worth is no more or less than the other Marines, unfortunately, that I have served with who have been killed.

In the *Hamdan* record, COL S described his emotions while visiting Ground Zero: "It is a sad sight. A lot of destruction there. Hard to fathom what was there and what

was left. . . . I would imagine that everyone who saw it was angry." COL S stated that he did not still think about his visit to Ground Zero.

In the *Hicks* record, COL S described his emotions while visiting Ground Zero as sadness rather than anger, again noting that there was a lot of destruction and loss of life. COL S responded as follows when asked how he would separate his 9/11 feelings and personal experiences from the evidence presented at trial:

> COL S: It's separate things.
> DC: Can you just explain for us how you go about doing that. Because we -- you understand that we need to know and be confident that you can be a fair commissioner, separate those things out, and give Mr. Hicks the fair trial that he's due and that we understand that you understand is your responsibility.
> COL S : I understand. I've read these charges. I understand that the fact that anybody's charged with anything doesn't [im]ply more than that they're charged with it. And I make no connection in my mind between those charges and my visit to the World Trade Center.
> DC: Nothing further, thank you.

COL S's written questionnaire and his voir dire in *Hicks* both indicate that, for a non-attorney, COL S has considerable prior military legal experience. COL S stated that he had previously served as both a witness and a member (juror) in courts-martial; that he has served as a special court-martial convening authority on [redacted] different occasions; and has attended specialized military legal training in the form of Senior Officer's Legal Courses and a Law of Land Warfare Course. He also conducted numerous summary courts-marital where he made determinations of both law and fact, just as members of military commissions are required to do.

As the defense stated in their brief in the *Hicks* case, "most Americans, and possibly all military personnel, are gripped by strong emotion, whether sadness, anger, confusion, frustration, fear, or revenge, at the memory of the September 11th attacks . . . ." The issue, however, is not whether a potential military commission member experienced a strong emotional reaction to events that happened over three years ago, or even whether that person candidly acknowledged such feelings, but rather is the member still experiencing those emotions such that he is unable to lay aside those feelings and render a verdict based solely on the evidence presented to the military commission. As the United States Supreme Court has stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best

> qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*

Irvin, 366 U.S. at 722-23 (citations omitted) (emphasis added).

Unlike LTC C, nothing in either record demonstrates that COL S is experiencing any ongoing emotions as a result of his 9/11 experiences. The Presiding Officer's recommendation states that there was nothing in COL S's demeanor during voir dire that indicated that he was unduly affected by the death of [redacted] COL S, who has considerable legal training and experience, clearly stated that he can and will try these cases without reference to his 9/11 experiences. Nothing in either record creates a reasonable and significant doubt as to COL S's ability to decide these cases fairly and impartially, considering only evidence and arguments presented to the commissions. Accordingly, the challenge for cause against COL S will be denied.

LTC T and COL B

The defense challenged both LTC T and COL B based upon their involvement with [redacted] at the time Mr. Hamdan and Mr. Hicks were apprehended.

The defense challenged LTC T based upon his role as an [redacted] officer on the ground in [redacted] from approximately [redacted] the period during which both Mr. Hamdan and Mr. Hicks were captured and detained. At trial, the prosecution opposed this challenge. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge.

The Presiding Officer concluded that there is cause to grant a challenge against LTC T because:

> "his activities [redacted] make his participation problematic in regards to his knowledge of activities in the [redacted] - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC T [] would insure [redacted] and the

modus operandi of both sides would not have an undue influence upon the deliberations of the panel."

During his voir dire in *Hamdan*, LTC T stated that he is an [redacted] officer who was assigned to a [redacted] that deployed both to [redacted] as part of [redacted] and to [redacted] as part of [redacted] with the mission to capture enemy personnel, but that he was not involved with the capture of Mr. Hamdan. He stated that it is possible that he may have seen [redacted] on Mr. Hamdan, but he has no memory of Hamdan's case. During his voir dire in *Hicks*, LTC T stated he was attached to a [redacted] as an [redacted] while deployed to [redacted]

During a closed session of trial, the *Hamdan* defense counsel challenged COL B based upon his role in transporting [redacted] In the open session, defense challenged COL B based on the appearance of unfairness because of his prior duty [redacted] During both open and closed sessions of trial, the *Hicks* defense counsel challenged COL B because his knowledge of [redacted] specifically his knowledge of the transportation of detainees, is such that he would be better suited to be a witness than a commission member, and further that his links with personnel in theater were such that he could be characterized as a victim.

At trial, the prosecution opposed the challenge against COL B. The post-hearing brief filed by the Chief Prosecutor does not oppose this challenge. The Presiding Officer's opinion is that there is no cause to grant a challenge against COL B.

In his written questionnaire, COL B indicated that on 9/11 he was newly assigned as the [redacted] As a result of 9/11, he was involved in developing and executing war plans [redacted] He also indicated that he was intimately familiar with [redacted] He was physically deployed to [redacted]

During voir dire, COL B stated that he was not involved in making the determinations of what detainees were eligible for transfer to Guantanamo [redacted] He specifically remembered Mr. Hicks' name and that he was Australian. He stated that he probably knew which U.S. forces captured Mr. Hicks, but cannot currently recall that information. He also stated that in his role [redacted]

Based on the totality of the factual circumstances, including the classified voir dire of LTC T and COL B which were reviewed but not discussed herein, the challenges for cause against both LTC T and COL B will be granted. Both officers were actively involved in planning or executing sensitive [redacted] in both [redacted] and [redacted] and are intimately familiar with the operations and deployments in [redacted] These experiences create a reasonable and significant doubt as to the ability of these two members to decide these cases fairly and impartially.

Presiding Officer

Hamdan's defense counsel challenged the Presiding Officer on four grounds:

(1) He is not qualified as a judge advocate based on being recalled from retired service and not being an active member of any Bar Association at the time he was recalled;

(2) As an attorney, he will exert improper influence over the other non-attorney members;

(3) Multiple contacts, in person or through his assistant, with the Appointing Authority thus creating the appearance of unfairness; and

(4) Previously formed an opinion on the accused's right to a speedy trial as expressed in a July 15, 2004, meeting with counsel from both the prosecution and the defense.

Hicks' defense counsel challenged the Presiding Officer on the same four general grounds. At trial, the prosecution in both cases opposed the challenge against the Presiding Officer. In a subsequent brief, the Chief Prosecutor recommended the Presiding Officer evaluate whether he should remain on the commission in light of the implied bias standard proposed by the prosecution as previously described herein.

Presiding Officer's Judge Advocate Status

Military Commission Order No. 1 requires that the "Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force." MCO No. 1 at Section 4A(4). The Presiding Officer's written questionnaire, dated August 18, 2004, indicates that he currently is, and has been, an associate member of the Virginia State Bar since 1977 and that he has never practiced law in the civilian sector.

In a written brief, Hamdan's defense counsel asserts the following:

1) All Army judge advocates are required to remain in good standing in the bar of the highest court of a state of the United States, the District of Columbia, or a Federal Court. U.S. Dep't of Army Reg. 27-1, "Judge Advocate Legal Services," para. 13-2h(2) (Sept. 30, 1996) [hereinafter AR 27-1].

2) The Virginia State Bar maintains four classes of membership: active, associate, judicial, and retired. Associate members are entitled to all the privileges of active members except that they may not practice law (in Virginia).

3) Because the Presiding Officer is only an associate member of the Virginia Bar, he is not authorized to practice law in the Army Judge Advocate General's Corps.

In Virginia, the term "good standing" applies to both associate and active members and refers to whether or not the requirements to maintain that specific level of membership have been met. *Unauthorized Practice of Law*, Virginia UPL Opinion 133 (Apr. 20, 1989), *available at* http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_Op133. "Good standing" generally means that the attorney has not been suspended or disbarred for disciplinary reasons and has complied with any applicable rules concerning payment of bar membership dues and completion of continuing legal education requirements.

As the proponent of AR 27-1, The Judge Advocate General (TJAG) of the Army is the appropriate authority to determine whether associate membership in the Virginia Bar constitutes "good standing" as contemplated in that regulation. The record establishes that the Presiding Officer's status with the Virginia Bar has not changed since he was admitted to the Virginia Bar in 1977. The record also shows that, as an associate member of the Virginia Bar, he practiced as an Army judge advocate for twenty-two years, including ten years as a military judge. Prior to his service as a military judge, the Army TJAG personally certified the Presiding Officer's qualifications to be a military judge as required by the Uniform Code of Military Justice. *See* UCMJ art. 26(b). Accordingly, this challenge is without merit.

Undue Influence over Non-attorney Members of the Commission

Under the President's Military Order, the commission members sit as "triers of both fact and law." President's Military Order at Section 4(c)(2). The defense asserts that this particular Presiding Officer will use his experience as a military trial judge and attorney to exert undue influence over the non-attorney members of the commission when deciding questions of law. In *Hamdan*, the Presiding Officer addressed this issue with the members as follows:

> Members, later I am going to instruct you as follows: As I am the only lawyer appointed to the commission, I will instruct you and advise you on the law. However, the President has directed that the commission, meaning all of us, will decide all questions of law and fact. So you are not bound to accept the law as given to you by me. You are free to accept the law as argued to you by counsel either in

> court, or in motions. In closed conferences, and during deliberations, my vote and voice will count no more than that of any other member. Can each member follow that instruction?
> Apparently so.
>
> Is there any member who believes that he would be required to accept, without question, my instruction on the law?
> Apparently not.

The exceptional difficulty and pressure with being the first Presiding Officer to serve on a military commission in over 60 years cannot be overstated. The Presiding Officer must conduct the proceedings with independent and impartial guidance and direction in a trial-judge-like manner. At the same time, the Presiding Officer must ensure that the other non-attorney members of the commission fully exercise their responsibilities to have an equal vote in all questions of law and fact. There is nothing in either record that remotely suggests that this Presiding Officer does not understand the delicate balance that his responsibilities require. Accordingly, the challenge on this basis is without merit.

Relationship with the Appointing Authority Creates Appearance of Unfairness

The precise factual basis for challenge on this ground was not very well articulated by counsel in either *Hamdan* or *Hicks*. In *Hamdan*, the defense counsel's entire oral argument on this ground was as follows:

> We are also challenging based on the multiple contacts that you have had, either through your assistant, or through yourself, with the [A]ppointing [A]uthority. I understand that you said that this is not going to influence you in any way. We believe that it creates the appearance of unfairness, and at least at that level, we challenge on that.

Defense counsel in *Hamdan* did not further articulate a factual basis for this challenge in their post-hearing brief.

In *Hicks*, defense counsel orally adopted the same challenge grounds as *Hamdan* including "the relationship with the appointing authority" and the "perception of the public" under the implied bias standard in RCM 912(f)(1)(N). Defense counsel in *Hicks* did not further articulate a factual basis for this challenge in their post-hearing brief, even though they individually and rather extensively discussed the factual basis for their challenges against the other four challenged members.

The gist of this challenge appears to be that defense counsel perceive that a close personal friendship exists between the Presiding Officer and the Appointing Authority,

and that the Presiding Officer will be viewed as, or act as, an agent of the Appointing Authority rather than an independent, impartial Presiding Officer. Alternately stated, the Appointing Authority will somehow appear to influence the performance of the Presiding Officer. To evaluate this challenge, it is necessary to understand the traditional social and professional relationships between a convening authority and officer members of courts-martial under the Uniform Code of Military Justice, as well as the criminal sanctions against unlawfully influencing the action of a member of a court-martial or a military commission.

In addition to duty or professional responsibilities, military officers of all grades, and often their spouses, are expected by custom and tradition to participate in a wide variety of social functions hosted by senior commanding officers or general officers. Such functions include formal New Year's Day receptions, formal Dining Ins (dinners for officers only), formal Dining Outs (dinners for officers and spouses/dates), formal Dinner Dances, Change of Command ceremonies, promotion ceremonies, award ceremonies, informal Hail and Farewell dinners (welcoming new officers and "roasting" departing officers), retirement ceremonies, and funerals of members of the unit. Because attendance at all such social functions is customary, traditional, and expected, such attendance is not indicative of close personal friendships among the participants.

In most cases, commanders who are authorized to convene general courts-martial under the UCMJ are high-ranking general or flag officers. *See generally* UCMJ art. 22. The eligible "jury pool" of officers for a general court-martial includes officers assigned or attached to the convening authority's command or courts-martial jurisdiction. The convening authority is required to select officers for courts-martial duty, who, in his personal opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2). Consequently, convening authorities frequently select as court members officers who they know well and whose judgment they trust.

To ensure that these professional and social relationships between convening authorities and court members do not affect the impartiality or fairness of trials by courts-martial or military commissions, and to maintain the neutrality of the convening authority, Congress enacted Article 37(a), UCMJ, "Unlawfully influencing action of court."[7] This is one of the UCMJ articles that expressly applies to military commissions. This statute prohibits any "attempt to coerce, or by any authorized means, influence the

[7] UCMJ art. 37(a) states in pertinent part (emphasis added):

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial *or any other military tribunal or any member thereof*, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

action of [a] . . . military tribunal or any member thereof, in reaching the findings or sentence in any case." UCMJ art. 37(a). Additionally, the knowing and intentional violation of the procedural protection afforded by Article 37(a), UCMJ, is a criminal offense in that any person subject to the UCMJ who "knowingly and intentionally fails to enforce or comply with any provision of this chapter [10 U.S.C. §§ 801-946] regulating the proceedings before, during, or after trial of an accused" may be punished as directed by a court-martial. UCMJ art. 98(2). The Presiding Officer, as a retired Regular Army officer recalled to active duty, and the Appointing Authority, as a retired member of the Regular Army, are both persons subject to trial by court-martial under the UCMJ. *See* UCMJ art. 2(a)(1),(4).

Article 37(a), UCMJ, protects not only the impartiality of courts-martial and military commissions, but also the judicial acts of a convening authority (appointing authority). "A convening authority must be impartial and independent in exercising his authority . . . . The very perception that a person exercising this awesome power is dispensing justice in an unequal manner or is being influenced by unseen superiors is wrong." *United States v. Hagen*, 25 M.J. 78, 86-87 (C.M.A., 1987) (Sullivan, J., concurring) (citations omitted). Even though a convening authority decides which cases go to trial, he or she must remain neutral throughout the trial process. *See, e.g. United States v. Davis*, 58 M.J. 100, 101, 103 (C.A.A.F. 2003) (stating that a convicted servicemember is entitled to individualized consideration of his case post-trial by a neutral convening authority). The Appointing Authority for Military Commissions, as an officer of the United States appointed by the Secretary of Defense pursuant to the Constitution and Title 10, United States Code, has a legal and moral obligation to execute the President's Military Order in a fair and impartial manner, consistent with existing statutory and regulatory guidance.

In his written questionnaire for counsel, the Presiding Officer stated the following about his relationship with the Appointing Authority (emphasis added):

> b. Mr. Altenburg:
>
> 1. I first met (then) CPT Altenburg in the period 1977-1978, while he was assigned to Fort Bragg. My only specific recollection of talking to him was when we discussed utilization of courtrooms to try cases.
>
> 2. To the best of my knowledge and belief, I did not see or talk to Mr. Altenburg again until sometime in the spring of 1989 at the Judge Advocate Ball in Heidelberg. Later, in November-December 1990, (then) LTC Altenburg obtained Desert Camouflage Uniforms for [another judge] and me so that we would be properly outfitted for trials in Saudi Arabia.

3. During the period 1992 to 1995, (then) COL Altenburg was the Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg while I was the Chief Circuit Judge, 2nd Judicial Circuit, with duty station at Fort Bragg. Our offices were in the same building. My wife, (then) MAJ M [], was the Chief of Administrative Law in the SJA office from 1992 to 1994. During this period, Mr. Altenburg and I became friends. We saw each other about twice a week and sometimes more than that. We generally attended all of the SJA social functions. He and his wife (and children – depending upon which of his children were in residence at the time) had dinner at our house at least three times in the three years we served at Fort Bragg. I attended several social functions at his quarters on post. *Though he was a convening authority and I was a trial judge, we were both disciplined enough to not discuss cases. I am sure there were times when he was not pleased with my rulings.*

4. From summer 1995 to summer 1996 when Mr. Altenburg was in Washington and I was at Fort Bragg, he and I probably talked on the telephone three or four times. I believe that he stayed at my house one night during a TDY to Fort Bragg (but I am not certain).

5. During the period June 1996 to May 1999, I was stationed at Mannheim, Germany and Mr. Altenburg was in Washington. Other than the World-Wide JAG Conferences in October of 1996, 1997, and 1998, I did not see nor talk to MG Altenburg except once--in May of 1997, I attended a farewell [ceremony] hosted by MG Altenburg for COL John Smith. In May 1999, MG Altenburg presided over my retirement ceremony at The Judge Advocate General's School and was a primary speaker at a "roast" in my honor that evening.

6. *Since my retirement from the Army on 1 July 1999, Mr. Altenburg has never been to our house and we have never been to his.* From the time of my retirement until the week of 12 July 2004, I have had the occasion to speak to him on the phone about five to ten times. I had two meetings or personal contacts with him during that period. First, in July or August 2001 when I was a primary speaker at a "roast" in MG Altenburg's honor at Fort Belvoir upon the occasion of his retirement. Second, in November (I believe) 2002, I attended his son's wedding in Orlando, Florida [near the Presiding Officer's home].

7. I sent him an email in December 2003 when he was appointed as the Appointing Authority to congratulate him. I also sent him an email in the spring of 2004 when I heard that he had named a Presiding Officer. Sometime in the spring of 2004, I called his house to speak to his wife. After we talked, she handed the phone to Mr. Altenburg. He explained that setting up the office and office procedures was tough. I suggested that he hire a former JA Warrant Officer whom we both knew.

8. *To the best of my memory, Mr. Altenburg and I have never discussed anything about the Commissions or how they should function. Without doubt, we have never discussed any case specifically or any of the cases in general. I am certain that since being appointed a Presiding Officer we have had no discussions about my duties or the Commission Trials.*

The voir dire in *Hamdan* did not pursue the nature of any personal relationship between the Presiding Officer and the Appointing Authority. During his voir dire in *Hicks*, the Presiding Officer stated the following concerning his relationship with the Appointing Authority (emphasis added):

DC: Now, I want to explore your relationship with the appointing authority.
PO: Okay.
DC: You have known Mr. Altenburg [since] 1977, 1978?
PO: Yes, sometime in that frame.
DC: And you had a professional affiliation for a period of time?
PO: As I said before my knowledge of Mr. Altenburg up until 1992 was minimal, I mean, really. Now he was the SJA of the 1AD, the 1st Armored Division, and I was over on the other side of Germany. We were at Bragg at the same time, but like I said I maybe talked to him once, I think. You see people on post, but that is about it. He and I were on the same promotion list to major, but he had already left Bragg by then. In 92 he came to Bragg as the SJA and I was the chief circuit judge with my offices right there at Bragg in his building, and my wife was his chief of [Administrative Law]. So from 92 to 96 you could say that we had a close professional relationship and within, I don't know, a couple months it became a personal relationship.
DC: And when you retired in May of 1999, Mr. Altenburg presided over your retirement ceremony?
PO: Right, at the JAG school.
DC: And he was also the primary speaker at a roast in your honor that evening?
PO: Yes.
DC: And, in fact, when Mr. Altenburg retired in the summer of 2001 you were the primary speaker at his roast?

PO: No, there were three speakers. I was the only one who was retired and could say bad things about him.
DC: And you also attended his son's wedding in sometime in the fall of 2002?
PO: In Orlando, yeah.
DC: And you also contacted Mr. Altenburg when you learned that he became the appointing authority for these commissions?
PO: Right, I did.
DC: And you are aware that there were other candidates for the position of presiding officer?
PO: Yeah, uh-huh.
DC: Thirty-three others, in fact?
PO: Okay. No. What I know about the selection process I wrote. I don't know who else was considered and who else was nominated. Knowing the Department of Defense I imagine that all four services sent in -- excuse me, that there were lots of nominations and they went somewhere and they got to Mr. Altenburg somehow. I don't know how many other people were nominated.
DC: So the ultimate question is how would you answer the concerns of a reasonable person who might say based on this close relationship with Mr. Altenburg that there is an appearance of a bias, or impartiality -- or partiality rather and that you were chosen not because of independence or qualifications, but rather because of your close relationship with Mr. Altenburg, and how would you answer that concern?
PO: Well, *I would say first of all that a person who were to examine my record as a military judge -- and all of it is open source. All of my cases are up on file at the Judge Advocate General's office in DC -- could see at the time when I was the judge at Bragg, sitting as a judge alone, acquitted about six or seven of the people he referred to a court-martial. They could look at the record of trial and see that in several cases I reversed his personal rulings. They could look at my record as a judge and see that I really don't care who the SJA was in how I acted. So a reasonable person who took the time to examine my record would say, no, it doesn't matter.*

. . . .

P: *Sir, do you care what Mr. Altenburg thinks about any ruling or decision you might make?*
PO: *No.* You want to ask what I think Mr. Altenburg wants from me?
P: Do you know, sir?
PO: No, I asked would you like to ask me what I think he wants?
P: Yes, sir.
PO: Okay. *I think John Altenburg, based on the time that I have known him, wants me to provide a full and fair trial of these people. That's what he wants. And I base that on really four years of close observation of him and my knowledge of him. That's what I think he wants.*
P: Do you think there would be any repercussions for you if he disagreed with a ruling of yours or a vote of yours?
PO: You all went to law school; right?
P: Yes, sir.

PO: Remember that first semester of law school and everyone is really scared?
P: Yes, sir.
PO: Well, I went on the funded program and all the people around me were really scared, but I said to myself, hey the worst that can happen is I can go back to being an infantry officer, which I really liked. Well the worse thing that can happen here, from you all's viewpoint, if you think about that, is I go back to sitting on the beach. *I don't have a professional career. Mr. Altenburg is not going to hurt me.* Okay.
P: Yes, sir. Nothing further, sir.

There is no factual basis in either record to support granting a challenge against the Presiding Officer on this ground. The records establish no actual bias by the Presiding Officer as a result of his former, routine, social and professional relationships with the Appointing Authority, nor do the parties advocate any such actual bias. Even on an implied bias basis, no well-informed member of the public who understands the traditional social relationships among military officers and the criminal prohibitions against the Appointing Authority attempting to influence the Presiding Officer's actions would have any reasonable or significant doubt that this Presiding Officer's fairness or impartiality will be affected by his prior social contacts with the Appointing Authority.

Such a finding is consistent with federal cases reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge. *See, e.g., Bailey v. Broder*, No. 94 Civ. 2394 (S.D.N.Y. Feb. 20, 1997) (holding that a showing of a friendship between a judge and a party appearing before him, without a factual allegation of bias or prejudice, is insufficient to warrant recusal); *In re Cooke*, 160 B.R. 701, 706-08 (Bankr. D. Conn. 1993) (stating that a "judge's friendship with counsel appearing before him or her does not alone mandate disqualification."); *United States v. Kehlbeck*, 766 F. Supp. 707, 712 (S.D. Ind. 1990) (stating "judges may have friends without having to recuse themselves from every case in which a friend appears as counsel, party, or witness."); *United States v. Murphy*, 768 F. 2d 1518, 1537 (7th Cir. 1985, cert. denied, 475 U.S. 1012 (1986) ("In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable."); *In re United States*, 666 F.2d 690 (1st Cir. 1981) (holding that recusal was not required in extortion trial of former democratic state senator whose committee, fifteen years ago, had investigated former republican governor when the judge had been chief legal counsel for the governor); and *Parrish v. Board of Commissioners*, 524 F.2d. 98 (5th Cir. 1975) (en banc) (holding that recusal was not required in class action case where judge was friends with some of the defendants and where judge stated his friendship would not affect his handing of the case).

Predisposition on Speedy Trial Motion

The fourth basis for challenge is that the Presiding Officer has formed an opinion, which he expressed at a July 15, 2004, meeting with counsel, that an accused has no right to a speedy trial in a military commission. Below are the pertinent portions of the voir dire in *Hamdan* on this issue (emphasis added).

DC: During that meeting on 15 July, did you express an opinion regarding speedy -- the right of any detainee to a speedy trial?
PO: No, I didn't.
DC: I wasn't at the meeting, but I was told that you did. I don't --
PO: Thank you.
DC: Did you mention speedy trial at all?
PO: Speedy trial was mentioned. Article 10 was mentioned, and there was some general conversation. I didn't take notes at the meeting. It was a meeting to tell people who I was and asking them to get -- start on motions and things.
DC: But you didn't expect -- while those things were mentioned, you don't recall expressing an opinion yourself?
PO: No. I didn't have any motions or anything.

. . . .

P: *Sir, the issue of speedy trial was brought up and we have, in fact, have notice of motions provided concerning speedy trial. Is there anything as you sit here right now which will impact your ability to fairly decide those motions?*
PO: *No.*

The following exchange occurred in the *Hamdan* commission after all voir dire had been completed and challenges made and the Presiding Officer was about to recess the commission until the Appointing Authority made a decision on the challenges:

DC: Yes, sir. It came to my attention after the voir dire that there was a tape made regarding the 15 July meeting between yourself and counsel. I'd like permission to send that tape along with the other matters that I'm submitting on your voir dire regarding your qualifications.
PO: And why would you like that?
DC: To go toward the idea of whether you have an opinion or not, sir.
PO: On the questions of?
DC: Speedy trial, sir.
PO: Okay. And the tape goes to show what?
DC: Your opinion at the time, sir. I have not yet transcribed it. If it doesn't show anything -- I am proceeding here based on what I've been told by other counsel.
PO: Okay. I would be -- let me think about this. Okay, let me think about this. I am reopening the voir dire of me. Explain to me -- ask me what you want about what I said or may have said on the 15th.
DC: Yes, sir. It's my understanding, sir, that on the 15th you expressed an opinion as to whether the accused have -- whether any detainee had a right to a speedy trial.
PO: Do you think that's correct or do you think that's in reference to Article 10?
DC: My understanding from counsel was that it referenced whether they would have a right to a speedy trial under Article 10 or rights, generally. I confess, sir, I have not heard the tape.
PO: Okay. Why don't you ask me if I am predisposed on that.
DC: Are you predisposed towards those issues, sir?

PO: I believe in the meeting -- I don't remember speedy trial, I remember Article 10 being mentioned, and I believe I said something to the effect of, Article 10, how does that come into play, or words to that effect. I did not know that my words were being taped, and I must confess that when I walked into the room that day I had no idea that Article 10 would come into play because I hadn't had an occasion to review Article 10. It is not something that usually comes up in military justice prudence -- jurisprudence. *So I'm telling you right now that I don't have a predisposition towards speedy trial.* However, although the tape was made without my permission, without the permission of anyone in the room, I do give you permission to send it to the appointing authority with the other matters.
DC: Sir, what I would like to ask, if I transcribe it, that I send it to you first.
PO: I don't want to see it.
DC: Yes, sir.
PO: Okay. Well, wait a second. Do you want to change -- do you want to add on anything to your challenge or stick with it?
DC: No, sir.
PO: How about you?
P: No objection to the tape being sent, sir.

Neither defense counsel nor the prosecution in the *Hicks* case asked any questions of the Presiding Officer concerning a possible predisposition on speedy trial.

In support of this challenge, Hamdan's defense counsel provided an edited transcript of the pertinent portions of the tape recording[8] of the July 15, 2004, meeting, which provides in part:

PO: Hicks has been referred to trial, right. There's no procedure that I've seen that requires an arraignment, has anyone seen anything like that? It requires [Hicks] be informed of the nature of the charges in front of the commission. Okay, uh, there's no such thing as a speedy trial clock in this thing. Right, has anybody seen a speedy trial?
Chief Prosecutor: Sir, I wouldn't even be commenting on that in light of the fact that I think [named defense counsel] believe Article 10 [UCMJ] applies to these proceedings so we ought to stay away from that issue.
DC (al Qosi): I don't think it is appropriate either sir.
Chief Prosecutor: We need to stay away from that.
DC (al Qosi): These are the subjects of motions that are going to be filed and your comments--
PO: I'm asking a question and you can all voir dire me on that, but how are we going to try Mr. Hicks?

[8] Counsel are reminded that audio recording of Commission proceedings is prohibited unless authorized by the Presiding Officer and that compliance with the Military Commission Orders and Instructions is a professional responsibility obligation for the practice of law within the Department of Defense. *See* MCO No. 1 at Section 6B(3); MCI No. 1 at paragraphs 4B,C.

Neither defense team cited any case law from any jurisdiction to support their argument that these facts warrant removal of the Presiding Officer. Generally speaking, "[a] predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'" *United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000) (quoting *United States v. Liteky*, 510 U.S. 540, 551 (1994)). Furthermore, "the mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir., 1976) (citing *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974)).

The transcripts reveal that on occasion, as in this instance, the Presiding Officer was too casual with his remarks. Some of the detainees at Guantanamo have been there for almost three years. Understandably, they and their attorneys recognize that the determination of what, if any, speedy trial rules apply to military commissions is an important preliminary matter that must be resolved by the members of the military commissions after considering evidence and arguments presented by the parties.

Although not artfully done, the Presiding Officer was trying to tell counsel at the July 15, 2004, meeting that there are gaps in the commission trial procedures that he and counsel will have to address. Prior to the Presiding Officer's comments about arraignment and speedy trial, counsel were advised that the Presiding Officer would be issuing written guidance addressing how to handle some of the gaps in the commission procedures. As the Presiding Officer stated at that meeting, there are no published commission procedures concerning the subjects of arraignment or speedy trial. He was using arraignment and speedy trial as examples of traditional military procedures that were not mentioned in military commission orders or instructions, and that he and the parties would have to address. In fact, just four days after this meeting, the Presiding Officer issued the first three memoranda in a series of Presiding Officer Memoranda, in the nature of rules of court, to address issues not fully covered by military commission orders or instructions.[9] There are currently ten Presiding Officer Memoranda addressing topics such as motions practice, judicial notice, access to evidence and notice provisions, trial exhibits, obtaining protective orders and requests for limited disclosure, witness requests, requests to depose a witness, alternatives to live witnesses, and spectators to military commissions.

During voir dire, the Presiding Officer expressly stated that he had formed no predisposition concerning how he would rule on speedy trial motions. Considering all of the above, the record fails to establish that the Presiding Officer's spontaneous remarks in an informal meeting demonstrates a clear inability to render a fair and impartial ruling on speedy trial motions or otherwise disqualifies him from performing duties as a Presiding Officer.

[9] Current versions of all Presiding Officer Memoranda may be found on the Military Commission web site, *available at* http://www.defenselink.mil/news/commissions.html.

DECISION

The challenges for cause against the Presiding Officer and COL S are denied. Effective immediately, the challenges for cause against COL B (the Marine), LTC T, and LTC C are granted and each of these members is hereby permanently excused from all future proceedings for all military commissions. The country is grateful for the professional, dedicated, and selfless service of these exceptional officers in this sensitive and important matter.

A military commission composed of the Presiding Officer, COL S, and COL B (the Air Force officer) will proceed, at the call of the Presiding Officer, in the cases of *United States v. Hamdan* and *United States v. Hicks*. No additional members or alternate members will be appointed. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

Official orders appointing replacement commission members for the cases of *United States v. al Qosi* and *United States v. al Bahlul* will be issued at a future date. *See* MCO No. 1 at Section 4A(1) and MCI No. 8 at paragraph 3A(1).

There is no classified annex to this decision.

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

United States, Appellee v. Martin T. ACOSTA, Lance Corporal U.S. Marine Corps, Appellant

No. 97-0905

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

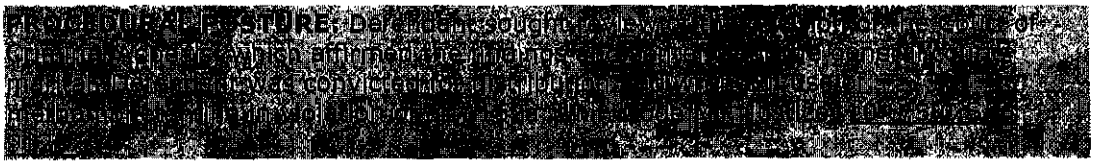
49 M.J. 14; **1998** CAAF LEXIS **775**

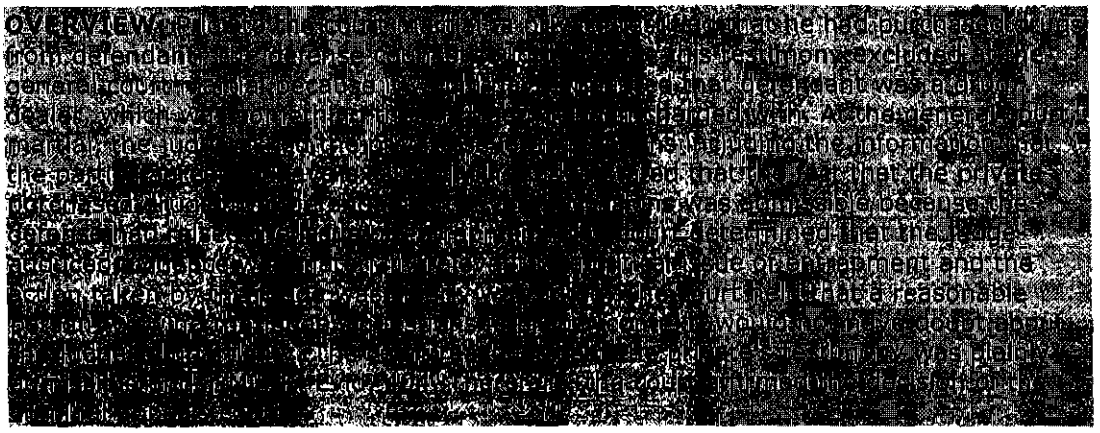
March 23, 1998, Argued
September 22, 1998, Decided

PRIOR HISTORY: [1]** Crim. App. No. 96-0429. Military Judges: R.S. Chester and T.G. Hess.

DISPOSITION: Decision of the United States Navy-Marine Corps Court of Criminal Appeals affirmed.

CASE SUMMARY





CORE TERMS: military, entrapment, methamphetamine, defense counsel, court-martial, questioning, session, impartiality, civilian, buy, uncharged misconduct, rebut, asking questions, confinement, appearance, forfeiture, objected, cross-examination, predisposition, predisposed, credibility, inducement, uncharged, commit, limiting instruction, reasonable person, entire record, specifications, admissibility, evidentiary

LexisNexis(R) Headnotes ◆ Hide Headnotes

1

Military & Veterans Law > Military Justice

Evidence > Witnesses > Judicial Interrogation of Witnesses

HN1 Art. 46, Unif. Code Mil. Justice, 10 U.S.C.S. § 846, and Mil. R. Evid. 614 provide wide latitude to a military judge to ask questions of witnesses called by the parties. Article 46 provides that a court-martial shall have equal opportunity with trial counsel and defense counsel to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Mil. R. Evid. 614 provides no limitation on the number or type of questions that a military judge may ask, although such questions may be objected to on legal grounds by either of the parties. More Like This Headnote | *Shepardize:* Restrict By Headnote

Military & Veterans Law > Military Justice

Evidence > Witnesses > Judicial Interrogation of Witnesses

HN2 Neither Art. 46, Unif. Code Mil. Justice, 10 U.S.C.S. § 846, nor Mil. R. Evid. 614 precludes a military judge from asking questions to which he may know the witness' answer; nor do they restrict him from asking questions which might adversely affect one party or another. More Like This Headnote | *Shepardize:* Restrict By Headnote

Military & Veterans Law > Military Justice

Evidence > Witnesses > Judicial Interrogation of Witnesses

HN3 While a military judge must maintain his fulcrum position of impartiality, the judge can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Witnesses > Judicial Interrogation of Witnesses

HN4 The legal test that flows from a judge questioning a witness is whether, taken as a whole in the context of the trial, a court's fairness, and impartiality were put into doubt by the judge's questions. This test is applied from the viewpoint of the reasonable person. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: For Appellant: Lieutenant Albert L. Di Giulio, JAGC, USNR (argued).

For Appellee: Lieutenant Commander Christian L. Reismeier, JAGC, USN (argued); Colonel Charles Wm. Dorman, USMC, and Commander D.H. Myers, JAGC, USN (on brief).

JUDGES: SULLIVAN, Judge Chief. Judge COX and Judges CRAWFORD, GIERKE, and EFFRON concur.

OPINIONBY: SULLIVAN

OPINION: [*15] Opinion of the Court

SULLIVAN, Judge:

During January and July of 1995, appellant was tried by a general court-martial composed of officer members at Marine Corps Base, Camp Pendleton, California. Contrary to his pleas, he was convicted of 4 specifications of wrongful distribution of methamphetamine and 2 specifications of wrongful use of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted grade. On January 23, 1996, the convening authority **[**2]** approved the adjudged sentence, but he suspended confinement in excess of 8 years for the period of confinement plus 12 months. He also approved total forfeitures, but only until the unsuspended confinement was terminated; thereafter, the approved forfeiture was $ 569.00 pay per month. The Court of Criminal Appeals affirmed the findings and sentence. 46 M.J. 670 (1997).

On September 10, 1997, this Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE PROFOUNDLY DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND MATERIALLY PREJUDICED THE SUBSTANTIAL RIGHTS OF APPELLANT BY ABANDONING HIS IMPARTIAL AND NEUTRAL ROLE.

We hold that the military judge did not abandon his impartial role during appellant's court-martial. See United States v. Ramos, 42 M.J. 392 (1995); see also United States v. Hill, 45 M.J. 245 (1996).

The court below summarized the facts underlying the granted issue as follows:

> During the Article 32 hearing prior to this general court-martial, Private Baumert testified in passing that he had purchased cocaine before from the appellant. Concerned that this evidence of uncharged misconduct would be brought out **[**3]** before the members at the court-martial, the appellant's counsel filed a motion in limine, on the basis of Mil.R.Evid. 403, "to prevent the introduction of this evidence." Appellate Exhibit I at 2. During the discussion of this motion, the Government stated that it did not intend to introduce this evidence **[*16]** and did not "oppose the motion as it relates to uncharged misconduct." Record at 16. The military judge observed that there were "hypothetical situations" in which the Government could appropriately use such evidence, such as to rebut "a blanket denial" by the appellant of any involvement with drugs. Record at 17. The military judge then directed the trial counsel, "if this case takes an unusual turn of events," to request an Article 39(a) session before trying to use this evidence. Id.

During his opening argument, the civilian defense counsel laid out his planned approach to the case. He stated that the evidence would show that his client was "not a sophisticated drug dealer." Record at 145. Instead, he merely tried to be a "life raft" for Private Baumert who had lost his normal supplier of crystal methamphetamine. Id. Private Baumert, in the meantime, was "desperate" to **[**4]** "target" someone who might sell him some drugs so that he could "save his skin" by getting the NCIS to report his cooperation to his command. Id. at 144. Although the defense counsel did not mention the word "entrapment" in his opening argument, this was clearly the gist of the defense's theory of the case.

Private Baumert was the first witness for the Government. He testified as to one uncontrolled buy and three controlled buys of methamphetamine he made from the appellant under NCIS auspices. He also testified as to his knowledge of the appellant's personal use of methamphetamine. Anticipating the entrapment defense, the trial counsel elicited testimony that the appellant displayed little or no reluctance in selling or using drugs on these occasions. Record at 152-61. A very extensive cross-examination followed, including many references to statements the witness had made during the Article 32 hearing. The defense counsel sought admissions that Private Baumert had been under great pressure to cooperate with the NCIS. Initially, he had identified Lance Corporal Nobbee as the individual he would target, but could not follow through because Nobbee had become an unauthorized absentee. **[**5]** As a result, Private Baumert admitted, in response to leading questions, that he had to "set someone else up" or "get somebody" to satisfy his NCIS handlers. Record at 169, 180. Although the civilian defense counsel used the word "entrapment" only once, one important thrust of the cross-examination (in addition to establishing that Private Baumert was not the most forthright and credible of witnesses) was that he, working with the NCIS, placed undue pressure on the appellant to commit a crime he would otherwise not have done.

On redirect, the trial counsel appeared concerned primarily with damage control as to his witness' credibility; he did not deal with entrapment at all. In a brief follow-up, the civilian counsel immediately sought to reemphasize his theme that the witness was under great pressure from NCIS to set up a buy. He then renewed his attack on the witness's credibility. Record at 187-88.

The military judge next asked a series of 89 questions. Record at 189-96. Record at 191. Although some of these were housekeeping questions or tried to clarify the witness's earlier testimony, the focus of many of them was to nail down why the witness believed in late December **[**6]** 1994 that the appellant would be willing to sell him crystal methamphetamine. Initially the witness testified that it was based only on "rumors." Record at 189. Upon further prompting by the military judge, the witness admitted that he had purchased drugs from the [appellant] "earlier," in July 1994. Record at 191. At this point the following exchange took place:

CC: Excuse me, Your Honor, if could. Can we have a short 39(a), sir?

MJ: No. Sit down, Mr. Tranberg. You raised an issue of entrapment.

Id. The witness then testified that this had happened only "one previous time" between July and December 1994. Id. Later, when the witness attempted to provide additional details about the July transaction, the military judge stated: "I don't want to know anything more about that. Okay?" Record at 192. However, the military **[*17]** judge continued to interrogate the witness, making clear that the appellant had sold methamphetamine to the witness in December 1994 a month or so before he had become involved with the NCIS. Record at 192-93. Although this sale and the associated use was charged misconduct and the trial counsel had established this sequence of events **[**7]** when he first questioned the witness, he had not emphasized it on redirect. See Record at 147-50. After the questioning by the military judge, however, and assuming they believed the witness, no reasonable member of the panel could have had any question but that the appellant was predisposed to distribute illegal drugs.

After both counsel had full opportunity to inquire of this witness, the military judge provided an instruction to the members as to the defense of entrapment. He also provided a very strict limiting instruction with respect to the testimony concerning the July 1994 transaction. Record at 198-99. The members posed no additional questions. The defense never objected to any of the military judge's questions or to his instructions.

46 M.J. at 672-74 (footnotes omitted; emphasis added).

The appellate court below found that the military judge erred in questioning the prosecution's chief witness about appellant's prior, uncharged "July 1994 drug transaction and several other adverse pieces of evidence." It also held that "the military judge committed additional error when he refused the civilian defense counsel's request for an Article 39(a) session." Id. **[**8]** at 675. Nevertheless, it concluded that the entire record raised little doubt concerning the trial judge's impartiality, or his appearance of impartiality; nor was appellant prejudiced by the above errors. Id. at 676. Appellant, before this Court, argues that the military judge's erroneous conduct constituted reversible error because it created a reasonable doubt as to the fairness of the proceedings against him.

The first question we will address in this case is whether the Court of Criminal Appeals was correct in concluding that the military judge erred in questioning the Government's principal witness about a prior, uncharged drug distribution from appellant in July of 1994. The appellate court below acknowledged that this testimony was admissible as rebuttal evidence once defense counsel raised the defense of entrapment as to the December 1994 and January 1995 drug distribution charges. Id. at 674. It held, however, that it was error for the military judge, rather than the trial

counsel, to elicit this testimony, which effectively devastated appellant's defense of entrapment. Such questioning, it asserted, "appeared to help the prosecution undermine the defense **[**9]** strategy" and "crossed the line of acceptable judicial interrogation." Id. at 675. We disagree.

HN1 Article 46, UCMJ, 10 USC § 846, and Mil.R.Evid. 614, Manual for Courts-Martial, United States (1995 ed.), provide wide latitude to a military judge to ask questions of witnesses called by the parties. See generally Ramos, 42 M.J. at 396. In this regard, we note that Article 46 provides that a court-martial shall have "equal opportunity" with trial counsel and defense counsel "to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Furthermore, Mil.R.Evid. 614 provides no limitation on the number or type of questions that a military judge may ask, although such questions may be objected to on legal grounds by either of the parties. For example, such questioning cannot be conducted in a manner which causes the military judge or members to become partisan or appear partisan in the case before them. See United States v. Ramos, supra; United States v. Dock, 40 M.J. 112, 128 (CMA 1994); see also Hill, 45 M.J. at 248.

Turning to the opinion of the appellate court below, it initially suggests that the military judge's questions **[**10]** were improper because he knowingly elicited answers to questions which favored the prosecution and which eviscerated appellant's defense of entrapment. HN2 Neither Article 46 nor Mil.R.Evid. 614 **[*18]** precludes a military judge from asking questions to which he may know the witness' answer; nor do they restrict him from asking questions which might adversely affect one party or another. Moreover, our case law has not gone that far. See Dock, supra at 128 (far better for military judge to abstain from asking questions whose answers he knows will favor prosecution). In addition, United States v. Moorehead, 57 F.3d 875, 878-79 (9th Cir. 1995), the civilian case heavily relied on by the court below for its finding of error in such questioning, is inapposite. There, the prior, uncharged drug-conduct evidence adduced by the judge, which devastated the defense case, was otherwise irrelevant. Here, the judge-adduced evidence was materially relevant to a critical issue in this case, i.e., appellant's defense of entrapment. Finally, in view of the military judge's own previous order excluding this evidence on a conditional basis at the request of the defense, immediate corrective action **[**11]** on his part was clearly warranted to respond to the change in circumstances wrought by the defense. See RCM 801(e)(1)(B), Manual, supra (recognizes military judge's power to change ruling "at any time during the trial").

Turning to the Court of Criminal Appeals' appearance-of-partisanship rationale, we also find it unpersuasive. Judge Wiss, writing for this Court in Ramos, supra at 396, articulated the appropriate standard of review:

> Thus, HN3 while a military judge must maintain his fulcrum position of impartiality, the judge can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further. See United States v. Dock, supra; United States v. Tolppa, 25 M.J. 352 (CMA 1987); United States v. Reynolds, 24 M.J. 261 (CMA 1987).
>
> HN4 The legal test that flows from all this is whether, "taken as a whole in the context of this trial," a court-martial's "legality, fairness, and impartiality" were put into doubt by the military judge's questions.

United States v. Reynolds, supra at 265. This test is applied from the viewpoint of the reasonable person. S.Childress & M. Davis 2 Federal Standards of **[**12]** Review § 12.05 at 12-38 (2d ed. 1992).

We conclude for several reasons that a reasonable person, viewing the questions of the judge in proper context, would not have doubt about the impartiality of this judge. First, neither appellant nor defense counsel subsequently objected to the judge's continued sitting in this case. See RCM 902(a) and (d); see generally Hill, supra at 249 (failure to object shows defense belief in neutrality). Moreover, 79 of the 89 questions asked by the military judge concerned matters previously covered by both trial counsel and defense counsel in their examination of this witness and did not suggest any judicial preference or belief. See United States v. Hobbs, 8 M.J. 71, 73 (CMA 1979); see also United States v. Norris, 277 U.S. App. D.C. 262, 873 F.2d 1519, 1526 (D.C. Cir. 1989); United States v. Tilghman, 328 U.S. App. D.C. 258, 134 F.3d 414, 417 (D.C. Cir. 1998). Furthermore, the remaining 10 questions were directly related to an evidentiary matter which the military judge subsequently gave extensive and repeated instructions concerning its proper and improper use. (See Appendix.) Finally, the military judge instructed the members on their sole responsibility to determine **[**13]** facts, but also to "disregard any comment or statement made by me [the military judge] during the course of this trial that may seem to indicate to you an opinion on my part as to whether the accused is guilty or not guilty. . . ." Cf. United States v. Filani, 74 F.3d 378, 386 (2d Cir. 1996)(curative instruction that jury is sole judge of credibility not sufficient).

A second question before us is whether it was error for the trial judge to summarily deny the defense an Article 39(a) session to discuss admissibility of this uncharged misconduct. On first look, such a curt response by the judge, which cut off defense counsel, seems one-sided, especially in light of the military judge's prior ruling suggesting the prosecution could request such a session to introduce this evidence. See generally Filani, supra at 385 ("It is no grace to a judge . . . to show quickness of conceit in cutting off evidence or counsel too short . . . . Francis Bacon, Essays, Of Judicature. . . ."). **[*19]** However, closer examination of the entire record of trial leaves a less partial impression of this discretionary decision by the trial judge. See United States v. Laurins, 857 F.2d 529, **[**14]** 538 (9th Cir. 1988) (decision to hold side-bar conference a discretionary matter for trial judge).

Here, the question of the admissibility of the uncharged misconduct, to a large extent, had been previously discussed by the parties and their respective positions made known to the military judge at an Article 39 session. Moreover, given the defense cross-examination of Private Baumert, which laid an evidentiary foundation for a defense of entrapment, there was no possibility that the military judge would have ruled in favor of the defense had he held an Article 39(a) session prior to asking the question at issue. See United States v. Pisani, 773 F.2d 397, 403-04 (2d Cir. 1985). Also, the evidence of a prior incident of drug distribution by appellant to the government witness was plainly admissible under Mil.R.Evid. 404 to show why the government witness approached appellant to buy drugs and to rebut any suggestion that appellant was entrapped by that same government witness. See United States v. Hunter, 21 M.J. 240 (CMA 1986). Finally, admission of this evidence for a specific, non-character purpose, coupled with a strict limiting instruction by the trial judge, fully responded **[**15]** to appellant's previously stated concern with the possible misuse of this evidence by the members in violation of Mil.R.Evid. 403. See Huddleston v.

United States, 485 U.S. 681, 99 L. Ed. 2d 771, 108 S. Ct. 1496 (1988). Thus, the judge's summary action, although abrupt, constituted an authorized rejection of defense counsel's legal argument. See United States v. Edmond, 311 U.S. App. D.C. 235, 52 F.3d 1080, 1100 (D.C. Cir. 1995).

In sum, we do not agree with the appellate court below that the military judge erred in his questioning of the Government's principal witness and in his summary rejection of defense counsel's request for an Article 39(a) session. However, we do share its general concern for appearances of fairness at court-martial and judicial impartiality. Nevertheless, we reject appellant's argument that this military judge was unfair in fact or appearance and join the service appellate court in affirming these convictions.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD, GIERKE, and EFFRON concur.

APPENDIX

MJ: Captain Glazier?

TC: Nothing further, Your Honor.

MJ: **[**16]** Members of the Court, before we proceed any further

> I'd like to give you some guidance about some evidence that you've just heard. In order to do this, however, I need to make sure you understand what the defense of entrapment is about and entrapment is a defense when the government agents or people cooperating with them such as Lance Corporal Baumert here cause an innocent person to commit a crime which otherwise would not have occurred. The accused cannot be convicted of an offense if he was entrapped.
>
> Now an innocent person is one who is not predisposed or inclined to readily accept the opportunity furnished by someone else to commit the offense charged. It means that the accused must have committed the offense charged only because of the inducements, enticements or urgings of representatives of the government, For this purpose, Private Baumert is clearly a government agent for the purpose of these alleged buys that he's testified about.
>
> You should carefully note that if a person has a predisposition, inclination or intent to commit an offense or is already involved in unlawful activity in which the government is trying to uncover, the fact that the agent provides **[**17]** opportunities, facilities or assists in the commission does not amount to entrapment.
>
> Now, the defense of entrapment exists if the original suggestion and initiative to commit the offense originated with the **[*20]** government, not the accused, and the accused was not predisposed or inclined to commit the offense. In this case it would be the distribution of methamphetamine. The focus in an entrapment case in which you

clearly do have government inducement or activity at least to some point is the latent predisposition of the accused which may be triggered by the government inducement.

So with that in mind, I mean, with some sense of what the defense of entrapment is all about, I want to touch on the evidence that came out, you know, certainly to my surprise that in July after a deployment the accused may have sold an illegal drug to Private Baumert here and this is important, gentlemen. You may consider this evidence but you may only consider it for a limited purpose and that would be its limited purpose to rebut any contention from the defense that his subsequent distributions of methamphetamine was a result of entrapment by the government.

In other words, this evidence, if **[**18]** you believe it at all, tends to show a predisposition and has a tendency to do away with defense of entrapment and that's it only purpose or function that you may consider it or it should be considered in trial because this offense has not been charged by the government.

Now, you consider this evidence, once again, only to limit any defense -- excuse me. Only for the limited purpose of considering any defense of entrapment and you may not conclude from this evidence, and again that's the earlier July transaction that this witness testified about, that the accused is a bad person or has criminal tendencies and he, therefore, committed the charged offenses.

The reason that we need to be so careful about this is -- I can't stress this enough -- is the accused is on trial only for the offenses that the government has charged him for. The government has not charged him with any offense back in July. But as it does evidence of the July transaction may be considered again for the limited purpose to, in this particular case, for its tendency to rebut the defense of entrapment.

Now, do all the members understand that? If so, please raise your hand.

And will any member have **[**19]** any difficulty following that instruction?

*1995 CCA LEXIS 407, **

UNITED STATES v. Eric D. EDMUNDS, 226 15 9252 Private First Class (E-2), U.S. Marine Corps

NMCM 94 00966

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

1995 CCA LEXIS **407**

February 14, 1995, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 18 December 1992. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 1st Marines, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

DISPOSITION: Affirmed.

CORE TERMS: military, defense counsel, continuance, guilt, convicted, breath, reasonable doubt, impartial, abandoned, open container, apprehension, violating, resisting, detected, driving, alcohol, sentry, gate, beer, beyond a reasonable doubt, assignments of error, assignment of error, bad-conduct, bias, credibility, deposition, first-hand, scheduled, credible, sentence

COUNSEL: LT D. JACQUES SMITH, JAGC, USNR, Appellate Defense Counsel.

Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel.

JUDGES: BEFORE R.M. MOLLISON, Senior Judge, E.D. CLARK, WILLIAM A. DeCICCO, Judge. E.D. CLARK, Judge dissenting.

OPINION: PER CURIAM:

We have examined the record of trial, the assignments of error, n1 and the Government's reply thereto, and we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. We will discuss the assignments of error in a different order than listed by the appellant in his brief.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 I. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE MILITARY JUDGE ABANDONED THE PROPER ROLE AS AN IMPARTIAL AND NEUTRAL ARBITER OF THE CASE AND ASSUMED THE ROLE OF A PARTISAN ADVOCATE FOR THE PROSECUTION.

II. AN UNSUSPENDED BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE

BECAUSE THE NATURE AND SERIOUSNESS OF THE OFFENSES AND THE CHARACTER OF THE APPELLANT DO NOT WARRANT IMPOSITION OF AN UNSUSPENDED BAD-CONDUCT DISCHARGE.

III. THE GOVERNMENT FAILED TO PROVE APPELLANT GUILTY OF THE CHARGED OFFENSES BEYOND A REASONABLE DOUBT.

IV. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A CONTINUANCE SO HIS COUNSEL COULD PROPERLY PREPARE FOR HIS CASE. (CITATIONS AND FOOTNOTE OMITTED.)

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[*2]**

I. The Denial of the Continuance Request

In the fourth assignment of error, the appellant argues that the military judge erred in denying his request for a continuance. The record indicates that this case was first scheduled for trial on 19 October 1992. Defense counsel requested a continuance until 10 November 1992, and this request was granted. At some point, trial was again delayed and scheduled for 1 December 1992. In another continuance request, defense counsel sought and received another delay until 17 December 1992. The continuance request at issue was a defense counsel request for further delay until 5 January 1993. The defense counsel argued that he needed more time to interview witnesses. Trial counsel opposed the request due to the deployment of a key prosecution witness on 19 December and because of the defense's refusal to participate in a deposition of the deploying witness. The military judge denied the request stating to the defense counsel "I think you've had the thing long enough to get your act together in this case." Record at 15.

The decision to grant or deny a continuance is within the broad discretion of the military judge and, absent clear abuse, **[*3]** will not be overturned. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986); *United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982). The trial date in this case had been postponed three times prior to defense counsel's last request. These delays encompassed approximately two months. Additionally, one of the prosecution's main witnesses was about to deploy and the defense would not stipulate to his testimony or consent to a deposition. Under these circumstances, we find no abuse of discretion by the military judge in denying the continuance.

II. Bias of the Military Judge

Next, the appellant argues that the military judge abandoned his impartial role during this trial. At several points, he advised the defense counsel that counsel's questions needed to be put in context or be clarified, that the questions were inartfully phrased or confusing, and that counsel was interrupting witnesses while the witnesses were answering the previous question. Record at 117, 118, 127, 129, and 137. These comments were made in front of the members. The military judge also took judicial notice of a base order after sustaining a defense authenticity objection to the document. During an out of **[*4]** court conference, the defense counsel expressed his concern to the military judge that the judge's comments gave the appearance that the military judge had abandoned his impartial role. The military judge afforded the defense counsel the opportunity to ask questions to the military

judge and pose a challenge. The defense counsel declined and instead requested a limiting instruction to the members which the military judge gave. Record at 145-46. All of the members indicated they understood the instruction and would comply with it.

We hold that the military judge did not abandon his impartial role by intervening to clarify questions, by advising the defense counsel to permit witnesses to finish their answers, or by taking judicial notice of the base order involved in this case. *See* United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987). Generally, courtroom clashes between counsel and the judge do not constitute disqualifying bias. United States v. Loving, 41 M.J. 213, 257 (1994). Judicial expressions of impatience, dissatisfaction, annoyance and even anger are not sufficient to disqualify the trial judge. *Id.* (citing Liteky v. United States, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). To **[*5]** obtain relief for judicial partiality, the trial judge's conduct must be so virulent that the judge's impartiality toward the client may reasonably be questioned. McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990). The conduct of the military judge in this case did not approach this level. The assignment of error lacks merit.

III. Lack of Proof Beyond a Reasonable Doubt

The appellant alleges that the prosecution failed to establish his guilt to the charged offenses beyond a reasonable doubt. We have carefully considered all of the evidence in this case, and we have concluded otherwise. We are satisfied of his guilt, both legally and factually, beyond a reasonable doubt on the offenses for which he was convicted. United States v. Turner, 25 M.J. 324 (C.M.A. 1987). The appellant was convicted of drunken driving, violating a base order by possessing an open container containing alcohol in his car, and resisting apprehension. There was testimony at trial by two of his friends who were in the car with him that they were with the appellant all day and that the appellant consumed only a can or a can and one-half of beer several hours before driving up to the **[*6]** gate of the base. However, the gate sentry detected the smell of alcoholic beverages on the appellant's breath. The appellant then failed a field sobriety test and refused to submit to blood, urine or breath tests. In the opinion of the Marines who observed him, he was swaying and wobbly, did not have full coordination, and had slightly slurred speech.

We find this evidence sufficient to establish that the appellant was operating a vehicle in a state of intoxication that impaired the rational and full exercise of his mental and physical faculties. *See* P 35c(3), Manual for Courts-Martial, United States, 1984 [MCM]. Also, it is not fundamentally unfair in violation of due process to use the appellant's refusal to take a blood-alcohol test as evidence of guilt, even though the sentries did not warn him that the refusal could be used against him at trial. Pennsylvania v. Muniz, 496 U.S. 582, 604 n.19, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990); South Dakota v. Neville, 459 U.S. 553, 74 L. Ed. 2d 748, 103 S. Ct. 916 (1983); Military Rule of Evidence 304(h)(4)(B) and Analysis of the Military Rules of Evidence, A22-13, MCM.

After pulling over the appellant, one of the Marines on duty confiscated an open 40-ounce bottle of beer which he found **[*7]** in plain view in between the front seats of the vehicle driven by the appellant. Given the fact that alcohol was detected on the appellant's breath, we are satisfied beyond a reasonable doubt that he was in possession of this open container in violation of the base order. We are likewise

convinced of his guilt of resisting apprehension which was a violent affray.

IV. Appropriateness of the Bad-Conduct Discharge

Having considered all of the circumstances in this case and the appellant's two prior nonjudicial punishments, we have concluded that a bad-conduct discharge is not inappropriately severe.

Accordingly, the findings and sentence, as approved on review below, are affirmed.

R.M. MOLLISON, Senior Judge

WILLIAM A. DeCICCO, Judge

DISSENTBY: E.D. CLARK

DISSENT:

CLARK, Judge (dissenting):

I am not convinced beyond a reasonable doubt of the appellant's guilt of violating a lawful general order or of driving while drunk. The only credible government witness to either of these events was Corporal Rodriguez, and he did not have first-hand knowledge of either. The only first-hand evidence of either of these two events came from rogue cops -one a previously convicted thief; **[*8]** the other having been previously disciplined for excessive use of force. I recognized that the members saw and heard these witnesses and made a determination of credibility. Nevertheless, in weighing the evidence, judging the credibility of the witnesses, and determining controverted questions of fact, I find the testimony of Private First Class Oostendorp and Lance Corporal Caudill even less credible than that of the defense witnesses.

E.D. CLARK

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
for Appropriate Relief

Transfer of the Accused as Punishment
for Cooperation in Commission Proceedings

6 April 2006

This motion is filed by the Defense and addresses the issues arising from Omar Khadr's transfer between detention camps at Guantanamo Bay, Cuba as punishment for his cooperation in the military commission process.

Relief Requested: The Defense requests that the Presiding Officer order the return of Mr. Khadr to Camp 4 or another detention facility of the same or lesser security for the remainder of commission proceedings.

Synopsis: The evidence shows Mr. Khadr has been administratively punished for his cooperation with the military commission process and this Presiding Officer. As such, he is entitled to immediate return to Camp 4 and such other relief as the Presiding Officer may deem appropriate.

Burdens of Proof and Persuasion: The burden of proof is on the Prosecution to justify adequate and reasonable grounds for the retaliatory transfer of Mr. Khadr in direct conjunction with military commission proceedings, and to demonstrate how such transfer contributes to the full and fair trial to which Mr. Khadr is supposedly entitled.

Facts:

1. From about August of 2005 until March 30, 2006, Omar Khadr resided in Camp 4 at Guantanamo Bay. Army Brig. Gen. Jay Hood has stated that "Everyone here knows about Camp 4, and every wants to be there." Military news articles describing Camp 4 in detail are attached as Exhibit A.

2. On March 30, 2006, at about 10:00 pm, four days before his scheduled hearing before this commission, Mr. Khadr was transferred to Camp 5, "a state-of-the art prison" where detainees are held in solitary confinement. "Thick steel airlock doors clang shut with a hiss and an echo as guards move through the cellblocks," states a military article describing the high security Camp 5 facility. Military news articles describing Camp 5 in some detail and including a photo, are attached as Exhibit B.

3. Omar Khadr is now detained at Camp 5. He is 19 years old, and has been held in continuous custody of military forces of the United States since he was 15 years old. In each of the two commission sessions before which he has appeared in January and April, 2006, he has cooperated fully and respectfully. On March 30, 2006, four days

before the commencement of the April 3-7, 2006 military commission session, he was transferred from Camp 4 to Camp 5. He did not engage in any misconduct prior to his transfer, and he has not been interrogated since his transfer to Camp 5.

4. Before his transfer, Mr. Khadr was detained at Camp 4, where he lived communally in an open facility in which there were frequent opportunities for access to the grounds outside, exercise and occasional access to books. Because the temperature in Camp 5 is kept uncomfortably low through heavy air conditioning, his wounds and joints become painful and uncomfortable. Sometimes, due to his isolation from all human contact other than guards, he is unable to concentrate or think straight.

5. As of April 6, 2006, Mr. Khadr had seen the sun only once in the five days since his transfer to Camp 5. He was given exercise time for about an hour during daylight hours, during which time he spoke with a detainee in military commission proceedings. In the early morning hours of April 4, 2006, the day on which his hearing before this commission was originally scheduled to commence, he was awakened and offered exercise at 2:00 in the morning. When he declined and returned to sleep, he was subsequently denied exercise in the morning because of his impending transfer to the commissions facility.

6. During a short visit with the Defense team on April 4, 2006, Prof. Ahmad, a member of the Defense team, delivered a package from Mr. Khadr's mother to him during a detention visit. The package contained a small plastic bottle (about 4 ounces) of Zum Zum water. This water is holy in Islam, and comes only from the Ab Zum Zum springs near Mecca, Saudi Arabia. Mr. Khadr kept the small bottle after the visit. The bottle was taken from Mr. Khadr by a guard, and the Zum Zum water was discarded by the guard despite Mr. Khadr's request that he be permitted to keep the water from the bottle in a cup.

7. On August 5, 2004, before civilian defense counsel had initially met with Mr. Khadr at Guantanamo Bay, Dr. Eric W. Trupin gave a declaration relating to the effects of prolonged detention in isolation on Omar Khadr (identified as "O.K." in the declaration because he was a juvenile at the time). The Declaration of Dr. Trupin is attached as Exhibit C. Dr. Trupin received his Ph. D. in clinical and community psychology from the University of Washington in 1974. He has served as a consultant to the U.S. Department of Justice and has evaluated the mental health of hundreds of youth detained in correctional facilities. Dr. Trupin noted that, at the time he gave his declaration, Omar Khadr had been held in solitary confinement since the time of his capture in July of 2002. ¶ 9. Among other conclusions in his Declaration regarding the ill-effects on Mr. Khadr of prolonged solitary confinement, he noted that "conditions of O.K.'s confinement may cause mental deterioration so severe as to impair O.K.'s ability to understand the legal consequences of the charges made against him and to assist his attorneys in his defense." ¶ 16.

8. Efforts by the Defense on April 4 and 5, 2006 to procure facts, a witness, a statement or other cooperation from the Prosecution regarding an explanation for the transfer of

Omar Khadr from Camp 4 to Camp 5 were unavailing. A copy of the email exchange between Cpt. John Merriam of the Defense team and Maj. Jeffrey [redacted] dated April 5 and 6, 2006 respectively, is attached as Exhibit D.

9. On the evening of April 5, 2006, while the parties and Mr. Khadr were in proceedings before the commission, Navy Commander Robert Durand, director of public affairs for JTF Guantanamo, issued a press statement. News articles relating to the press statement are attached as Exhibit E. Cmdr. Durand stated that "no one at Guantanamo Bay is ever in solitary confinement." Further, he is quoted in an Armed Forces article as stating, "Consistent with Army regulations, individuals in a pre-trial status are separated from the general population. These measures are largely for the protection of the detainee." In another article, Cmdr. Durand is quoted as saying that "Mr. Khadr was moved to a cell alone in a higher-security area for his own protection but can still see and talk to other inmates on his tier." An article on the Canadian website CTV.ca, filed at 8:27 pm on 5 April 2006, and contains a version of the Durand statement. No earlier press releases contain that information, and no copy of the press statement has been provided to the Defense despite repeated requests to the Prosecution.

10. On or around March 30, 2006, seven other detainees in commission proceedings also were transferred to Camp 5 from lower security camps on the eve of commission hearings during the week of April 3-7, 2006, while the two detainees charged by military commission who have not cooperated in this process remained in the camps to which they were assigned. All eight other detainees with pending cases were transferred with him. Affidavit of Colonel Michael I. Bumgarner, attached as Exhibit F. Colonel Bumgarner's Affidavit was delivered to the Defense team at approximately 1:40pm on April 6, 2006.

11. The defense believes that the two detainees in commission proceedings and not transferred are Al Sharbi and Al Bahlul. That and other facts are included in a Defense proffer included with this motion as Exhibit G.

Argument:

1. The transfer of Omar Khadr to Camp 5 on the eve of commission proceedings was without justification based on his conduct, and was retaliatory for his cooperation before this body. This retaliatory transfer by detention authorities prejudicially impedes his ability to participate in his own defense. Further, retaliatory transfer prejudicially impedes the ability of his military counsel to develop a trusting relationship with their new client and constitutes affirmative government interference in the attorney-client relationship.

2. First, it is clear that Omar Khadr's transfer was because he has cooperated in military commission proceedings. The Prosecution does not contest that Mr. Khadr and seven other detainees were transferred to Camp 5 on or around March 30, 2006. Two detainees – Al Bahlul and Al Sharbi – were not transferred. The two who were not

transferred have resisted all cooperation with the commission process, as evidenced by the transcripts and filings in their cases, all of which are part of what is referred to by this commission as commission law, of which the commission can take final notice under existing POMs. The same is true as to the identity and pendency of commission proceedings against the eight cooperative detainees. This systematic transfer of all but the two uncooperative detainees makes it clear that the transfer of Omar Khadr was not for his safety or protection but for isolation and constructive punishment for the polite exercise of his right to an allegedly full and fair hearing before this commission.

3. Omar Khadr's mental and physical well-being are so profoundly affected by his transfer to an isolation cell in Camp 5 that he is affirmatively and prejudicially impeded from participating in his own defense. In the proffer of evidence, Mr. Khadr makes clear that he is deeply affected, both physically and mentally, by even short stays in the isolation cells of Camp 5. In that facility, he is kept from any significant contact with human beings other than his guards. He is allowed to exercise only occasionally, and then only for an hour, usually at night. His living conditions are such that Mr. Khadr states that sometimes he cannot concentrate or think straight, and that he is distracted by physical pain due to those conditions. The affidavit of Prof. Eric Trupin, a recognized expert on the issues of young people in detention, makes clear that the ongoing detention of Omar Khadr in solitary confinement impair his "ability to understand the legal consequences of the charges made against him and to assist his attorneys in his defense."

4. "Commission law" clearly includes international law. In the decision of the Appointing Authority in United States v. Hamdan and United States v. Hicks, Appointing Authority Decision on Challenges for Cause, Decision No. 2004-001, Oct. 19, 2004, available at http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf, General Altenburg made extensive direct use of international law in his decision. See, especially, pp. 8-9. The Appointing Authority used authority from the European Court of Human Rights to support his position. Id. Less than three weeks ago, and only nine days before Omar Khadr's transfer from Camp 4 to Camp 5, the Inter-American Commission on Human Rights, the human rights body directly involved in oversight of human rights violations in the Americas, asked the United States government to seek precautionary measures to protect Omar Khadr during his detention here at Guantanamo. In the resolution paragraphs of their request, the Commission asked that the U.S. government "take the urgent measures necessary" to "ensure that [Omar Khadr] is not subjected to prolonged incommunicado detention" because such treatment "fail[s] to comply with international standards of humane treatment" as set out in their decision. The text of the letter from the Inter-American Commission on Human Rights to Prof. Richard Wilson, one of the Defense team for Omar Khadr, is attached to this motion as Exhibit H. This effort by the Inter-American Commission to protect Mr. Khadr's human rights is in recognition of the intensely debilitating nature of prolonged detention and its effects on the ability of Mr. Khadr to assist in his defense.

5. In a long line of cases, the United States Supreme Court and lower federal courts have recognized that direct government interference with the right to counsel is a *per se* violation of the right to counsel. United States v. Cronic, 466 U.S. 648 (1984); Perry v. Leeke, 488 U.S. 272 (1989); Shillinger v. Haworth, 70 F.3d 1132 (10th Cir. 1995). This occurs when the government has so pervasively interrupted the attorney-client relationship that the defense is unable to perform its function. In such cases, prejudice is presumed and no harmless error standard applies. This should be no less true in commission proceedings than in federal criminal proceedings, since the right to counsel in these proceedings is at least as important, if not more important than the right to counsel in commissions. Here, the actions of the government directly impair the ability of detailed military defense counsel, who have no choice in appearing on behalf of Mr. Khadr, to begin to build a trusting relationship with their new client, particularly Lt. Col. Vokey, who has only recently met with Mr. Khadr for the first time. Mr. Khadr is under the absolute control of the government in at least three critical respects: with regard to his confinement, with regard to his trial, and with regard to his legal representation. Here, the very same military that detains Mr. Khadr provides him with counsel. Both wear the same uniforms, whether they meet as counsel or serve as his guards in Camp 5. Here, interference by the government in the attorney-client relationship, particularly at its outset, is so pervasive that counsel must overcome nearly insurmountable obstacles. The government has effectively denied Omar Khadr his right to military counsel.

6. Article 13 of the UCMJ (10 USC sec. 813) provides as follows: "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline." Approximately one month ago, a military appeals court held that, when dealing with pretrial detainees, it would "scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a reasonable evaluation of all the facts." Maximum custody is arbitrary when it is unnecessary to assure presence at trial or is unrelated to security needs. United States v. Crawford, 2006 CAAF LEXIS 251 (2006). Moreover, the Due Process clause of the Constitution requires that conditions of confinement satisfy certain minimal standards for pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979).

7. Mr. Khadr is entitled to be returned to Camp 4 for the duration of commission proceedings unless some reason other than the pending charges against him or "smoother camp operations" requires different treatment. A federal court can order that he be returned to the general population. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) (order attached at 173-174). This commission should order no less.

Exhibits: Exhibits A through H are attached hereto.

Witnesses and Argument: The Defense has requested testimony from Colonel Bumgarner, Commander Durand and detainee Sufyian Barhoumi, to the best of submitting Defense counsel's knowledge at this time.

Respectfully submitted,

//s//
Richard J. Wilson
Detailed Civilian Defense Counsel

Exhibit A

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

New Guantanamo Camp to Pave Way for Future Detention Ops

By Donna Miles
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, June 28, 2005 – For a glimpse at what's ahead for the detention facility here for enemy combatants, look no farther than Camp 4, one of five camps that make up Camp Delta here along Radio Ridge.

Camp 4, the only medium-security camp at Guantanamo Bay, is the most sought-after camp here for detainees here. It's reserved only for those who live by the camp rules and offers them the privilege of living in a communal setting that offers more freedoms and perks than less-cooperative detainees receive.

Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo Bay, said the camp is proving so successful in encouraging detainees to cooperate with camp rules that he's incorporating lessons learned here in Camp 6, a new, permanent facility to be built here.

"Everyone here knows about Camp 4, and everyone wants to be here," Hood told military analysts who traveled here June 24 to observe detention operations.

Camp 4 offers a wide range of incentives for good behavior. It features a common area that allows detainees to eat, sleep and pray together, Hood explained. Instead of the unpopular orange jumpsuits less cooperative detainees wear, those in Camp 4 wear white clothes that represent something of a status symbol among the detainee population. They get seven to nine hours a day outside their living quarters for recreation. Instead of having their meals delivered to their cells on a tray, they get containers of prepared food that they dish up and eat family-style.

Detainees at Camp 4 get access to volleyball nets and ping-pong tables and are treated to ice cream every Sunday, Hood said. They can request copies of the National Geographic magazines they love and occasionally get to watch Arabic family TV shows and soccer highlights. And five times a day, when the Muslim call to prayer sounds over the camp's speaker system, they get to pull out their prayer rugs, orient them with arrows throughout the camp that point toward Mecca, and pray as a group.

"One thing that is really different in this camp is that we have a working relationship with these people," said Chief Warrant Officer Tom Peal, officer in charge of the camp. "We're here to make them feel as comfortable as possible."

Hood stressed that entree to Camp 4 is not based on how forthcoming a detainee is during interrogations. The price of admission to the camp is simply following camp rules.

"There's a big incentive for detainees to want to be here," said Command Sgt. Maj. Anthony Mendez. In fact, during the two years that he's served at Guantanamo Bay, Mendez said he's seen only about 10

detainees get transferred to another camp for bad behavior.

Less cooperative detainees - those who spit at or throw urine and excrement at guards, refuse to leave their cells when ordered to or break other camp rules - live in four other camps, all with more restrictions.

A new facility that recently received funding, Camp 6, will build on successes at Camp 4 in promoting good behavior among detainees, Hood explained.

The camp, the second permanent facility to be built here, will provide a living environment more suitable to long-term detention, officials said. It will offer more communal living, increased access to exercise areas, activities, mail and foreign-language materials, and enhanced medical facilities.

Other perks will be offered depending on detainees' behavior. "We'll be able to ratchet it up or down, based on (a detainee's) compliance," Hood said.

Hood said experience at Guantanamo Bay demonstrates that it generally works to everyone's advantage when there's cooperation on both sides. Detainees are less violent. Guards are safer. Interrogators are more able to build rapport and gather intelligence.

In running a detention facility, "there has to be some give and take," Hood said.

"We're going to treat these detainees humanely. That's the bottom line. But we also want to find some ways to establish rapport and promote cooperation," he said. "That's the best way for us to accomplish our mission here."

Related Site:
Naval Station Guantanamo Bay, Cuba

News Archive

http://www.defenselink.mil/news/Jun2005/20050628_1890.html

Exhibit B

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Commander Leads Gitmo Guard Force Through Challenges

By Sgt. Sara Wood, USA
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, March 31, 2006 – Navy Cmdr. Catie Hanft knows she asks a lot of the sailors and soldiers she commands. They work 12- to-14 hour shifts in intense heat, dealing with a difficult group of people from a culture foreign to them, all the while knowing their work is under international scrutiny.

But with a focus on leadership, Hanft, deputy commander of the Joint Detention Group and commander of the Navy Expeditionary Guard Battalion here, is bringing her troops past these challenges to a place where they are fulfilling their mission and contributing to the fight against terrorism.

Navy Cmdr. Catie Hanft, deputy commander of the Joint Detention Group and commander of the Navy Expeditionary Guard Battalion at Guantanamo Bay, Cuba, stands in a display of a typical compliant detainee cell at Camp Delta, Naval Station Guantanamo Bay, March 30. Photo by Sgt. Sara Wood, USA

"Being down here is the right thing to do," Hanft said. "Seeing how hard the sailors and soldiers work, I know we're doing a good job."

The roughly 500 sailors in the Navy Expeditionary Guard Battalion provide security inside Camp Delta, the main detention facility here. An additional 400 to 450 soldiers provide security for other smaller camps and Camp 5 -- the newest and most high-security facility -- as well as external security outside the camps.

In all the facilities, guard force troops face unique challenges when dealing with the detainees, Hanft said. Detainees who have been here for a long time and are frustrated and depressed often act out against the guards by assaulting them, throwing things at them or calling them names, she said.

Guards are not allowed to react to detainee outbursts, but are relieved from their posts and taken care of while the detainee is put in segregation as punishment, Hanft said. This has been a challenge for her troops, she said, because they cannot give in to their natural inclination to defend themselves when attacked.

"I ask young sailors to put aside their personal political beliefs and to reach deep into their ethical beliefs, and to look past the differences and problems, and to be humane," she said. "That's a big challenge, to do that on a daily basis."

The long hours also are taxing on the guard troops, Hanft said, especially when they're required to

keep their composure at all times and use interpersonal skills to work with the detainees and foster cooperation. Servicemembers receive cultural training before reporting here, but the Muslim culture isn't something that can be learned overnight, she said.

"No matter how much you tell a person what they can expect, they won't fully understand until they come down here and see the reality and live the reality day to day," she said.

A negative worldwide perception of detention procedures at Guantanamo Bay has been a challenge for her troops to overcome, Hanft said. These troops have sacrificed a year of their lives to leave home and serve their country, doing a very arduous duty, and it's hard for them to hear criticisms and accusations leveled at them in the United States and abroad, she said.

"It's very hard on them to know that they are volunteering -- they are sacrificing their families and themselves -- to come down to a place that many people don't understand and that many people criticize," she said.

Many criticisms of Guantanamo Bay occur because people haven't visited the facilities and witnessed detention procedures, Hanft said. "Until you really fully understand what's going on down here and see what's going on down here on a daily basis, then you can't really comment on it," she said.

The Guantanamo Bay leadership is constantly making improvements to make detainee operations better, Hanft said. The detainees' menu was recently changed to a more Mediterranean-style cuisine to suit their preferences, and detainees have a choice of four different meal plans, she said.

As always, all detainees are given basic issue items and afforded the right to practice religion, Hanft said. Compliant detainees are given comfort items, such as games, library books, and pens and paper, she said. Highly compliant detainees are allowed to live communally, sharing meals and recreation, and spend more time out of their cells, she said.

Female guards perform the same duties as their male counterparts, with one exception, Hanft said. When a detainee is showering at the end of the cellblock, female guards cannot go more than two-thirds of the way down the block, she said. Also, when detainees are using the bathroom facilities in their cells, they are allowed to cover themselves with a sheet or exercise mat.

Legal procedures being put in place for these detainees are ones the U.S. government has never had to employ before, so there are many issues to work out, Hanft said. While that system is being developed, the servicemembers at Guantanamo Bay have been charged to safely, securely and humanely detain the suspected terrorists, and they are doing so with integrity and discipline, she said.

"The American people need to trust that the military, who they've turned to before in times of need, are doing what they need to do," she said.

Related Site:
Joint Task Force Guantanamo

Related Article:
Outgoing Commander Reflects on Guantanamo Mission

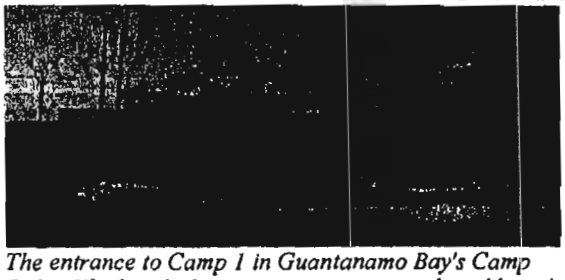
News Archive

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Detainees Living in Varied Conditions at Guantanamo

By Kathleen T. Rhem
American Forces Press Service

NAVAL BASE GUANTANAMO BAY, Cuba, Feb. 16, 2005 -- The detainee population at the U.S. naval base here is a diverse group. The roughly 545 detainees hail from some 40 countries and speak at least 17 different languages.



The entrance to Camp 1 in Guantanamo Bay's Camp Delta. The base's detention camps are numbered based on the order in which they were built, not their order of precedence or level of security. Photo by Kathleen T. Rhem
(Click photo for screen-resolution image); high-resolution image available.

But nearly as diverse as the individuals themselves are the conditions in which they're held.

Since U.S. officials began holding enemy combatants here in January 2002, an elaborate system to manage those detainees in a humane manner, protect guards and maximize intelligence has evolved here.

Today, prisoners are divided into four levels, based on how well they comply with camp rules, explained a senior Navy petty officer serving here.

Navy Master Chief Petty Officer Tracy Padmore, an aviation maintenance technician from Naval Air Station Jacksonville, Fla., explained that detainees are placed in levels based solely on how well they cooperate with guards' instructions. "(The levels) have nothing to do with what a detainee's (intelligence) value is or what he might say or do in an interrogation booth," he said.

"Humane" and "consistent" seem to be watchwords for members of the joint task force here. Anyone working with detainees uses these words right off the bat when describing what they do. Guards and officers at Guantanamo consistently appear genuinely offended when asked about allegations in the civilian media about detainee abuses at Guantanamo Bay.

"I'm not here to say we're all perfect," Padmore said. "But these young men and women carry out their duties in a highly professional manner." He added that when minor infractions of the rules by guards have occurred, they've been punished swiftly.

"Detainees here at Guantanamo are treated in a humane manner at all times by the security folks and the intelligence folks who work with them," Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo, said.

He said all JTF members are strongly focused on their mission, "the safe, secure, humane custody of the detainees under our charge."

Hood explained that information collected since the detainees have been held here has helped officials learn how best to handle the detainees' continued detention and to design suitable facilities.

Level 1 detainees wear white "uniforms" and share living spaces with other detainees. At the other end of the spectrum, Level 4 detainees wear orange, hospital scrub-type outfits and have fewer privileges.

Padmore, who is assigned to Joint Task Force Guantanamo based on prior corrections experience, described a typical Level 1 detainee as "compliant and willing to follow camp rules." Whereas, Level 4 detainees generally "have a litany of offenses," from threatening other detainees or guards to hurling bodily fluids at guards or refusing to come out of the cell when ordered.

To a certain extent, the level a detainee is placed in determines where he is housed, as well. Most Level 1 detainees are afforded extra privileges in Camp 4. (Camps are numbered based on the order in which they were built, not their order of precedence or level of security.)

Gone are the days of concrete slabs and open-air chain-link enclosures in Camp X-Ray. Hood explained that Camp X-Ray was a hastily built structure to deal with a rapidly changing situation in the war on terrorism and that the facilities there were never meant to be used for long-term detention. Engineers began construction on Camp Delta, which replaced Camp X-Ray in April 2002, shortly after detainees began arriving here, he said.

In Camp 4, part of Camp Delta, detainees live in 10-man bays with nearly all- day access to exercise yards and other recreational privileges.

Sgt. 1st Class Todd Rundle, an Army Reserve military police officer, explained that Camp 4 is Camp Delta's only medium-security facility. Doors in the camp are normally opened with keys, but a mechanical override can be controlled from inside the centrally located "Liberty Tower," the camp's command post, in an emergency.

Detainees generally are allowed out in exercise yards attached to their living bays seven to nine hours a day. Exercise yards include picnic tables under cover and ping-pong tables. Detainees also have access to a central soccer area and volleyball court.

Rundle said the large amount of outdoor time is a huge incentive for detainees to want to be transferred to Camp 4, which is based on good behavior. "The increased incentive of the additional time out here, that's a big thing for detainees to be able to come out for that duration of time over the course of every single day of the week," he said.

Part of the rationale behind the living arrangements at Camp 4 is to rebuild detainees' social skills, "which might have been lost over time," Rundle said. Detainees are provided games -- chess, checkers and playing cards are the most requested items -- and are responsible for keeping their own living areas clean.

They also eat meals together within their cellblocks. Food-service personnel bring the food, always culturally sensitive, and detainees apportion it among themselves at mealtime. Padmore said a guard always supervises so "Detainee A is not getting three plates while Detainee B gets none."

Books and other reading material are available during periodic visits from a designated librarian. A security official explained Agatha Christie books in Arabic are very popular and that camp officials are working to get copies of the Harry Potter books in Arabic.

Also in Camp 4, detainees are issued a full roll of toilet paper each week. In other camps detainees have to ask guards to apportion toilet paper when they need it. Padmore said many people take toilet paper for granted and that the detainees in Camp 4 value having their own supplies.

Other privileges unique to Camp 4 include electric fans in the bays, ice water available around the clock, plastic tubs with lids for the detainees to store their personal items, and the white uniforms. White is a more culturally respected color and also serves as an incentive to detainees in other camps.

"It's almost like a status symbol," he said. "Detainees come past and see detainees from Camp 4 playing volleyball, playing soccer or in white uniforms. The hope is that other detainees will play by the rulebook and aspire to get to Camp 4 to get those privileges afforded to them."

Not too far away, in Camp 1, some detainees are just one step away from being moved to Camp 4. They wear tan uniforms and are afforded such comfort items as prayer rugs and canvas sneakers. Many of these detainees are being considered for transfer to Camp 4, Rundle said.

Detainees in Camp 1 are housed in individual cells with a toilet and sink in each cell. The have 30 minutes in one of two exercise yards at the end of each cellblock twice a week, Padmore explained. Showers are allowed in outdoor shower stalls after exercise periods.

There are 10 cellblocks with 48 cells each, but guards generally don't fully populate the cellblocks to minimize the guard-to-detainee ratio.

Movement into and within the camp is funneled through "sally ports," entrances and passageways with two gates. One gate must be closed before the next can be opened. Military police officers man each sally port from inside.

Each detainee gets basic items such as a "finger toothbrush" -- short and stubby so it can't be used as a weapon -- toothpaste, soap, shampoo, plastic flip flops, and cotton underwear, shorts, pants and a shirt.

Guards are not allowed to remove basic items, but comfort items can be taken away for behavior infractions. Comfort items can include such simple things as Styrofoam cups and caps to the water bottles.

Some seemingly innocent items are kept from detainees to prevent them from harassing guards. For instance, sport tops on water bottles can make it easier for detainees to shoot bodily fluids onto guards, Padmore said.

The most recently completed detention facility, Camp 5, is a state-of-the-art prison that many states would envy. The $16 million facility, completed in May 2004, is composed of four wings of 12 to 14 individual cells each.

The two-story maximum-security detention and interrogation facility can hold up to 100 people and houses Level 4 detainees and those deemed to be the most valuable intelligence assets. The camp is run from a raised, glass-enclosed centralized control center that sits in the middle of the facility, giving the MPs a clear line of sight into both stories of each wing. Army National Guard Maj. Todd Berger called the control room "the nerve center of the camp."

Berger, who in civilian life is a state trooper in New Jersey, explained that all detainee movement in Camp 5 is monitored and controlled through touch- screen computers in the control center.

Thick steel airlock doors clang shut with a hiss and an echo as guards move through the cellblocks. In Camp 5, media and other visitors are not permitted to tour occupied cellblocks. The modern facility features some cells equipped with overhanging sinks and grab bars on the toilets for detainees with a physical disability and 10-foot-by-20-foot outdoor exercise yards that detainees generally have access to for an hour every day.

Camp rules are posted in four languages -- Arabic, Farsi, Urdu, and Pashto -- in the exercise yards in each of the camps. Recently, the enclosed bulletin boards have also featured posters with information about the Afghan elections. "It talks about the fact that 10 million Afghanis freely elected their own government," Rundle said. "So it's a bit of news from home ... for a chunk of the detainee population here."

Cultural sensitivity is consistently practiced in each of the camps. Respect for Islam is evident in many of the policies. For instance, in each cell in Camp 1, a Koran is stored hanging in a surgical mask from the cell wall. The purpose of the surgical mask is to hold the Muslim holy book "in a place of reverence," Padmore said.

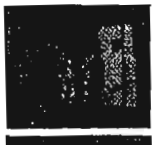
In each cell block a painted arrow points toward Mecca, Saudi Arabia, so the detainees know which way to face during their daily prayers. During Ramadan, detainees were allowed to break their daily fast with water and dates at the appropriate time, and prayer calls are broadcast over loudspeakers five times a day.

Regardless of his assigned level or camp, no detainee is considered to be more or less dangerous than another. "I can't say who's dangerous and who's not," Padmore said. "I consider them all dangerous people because they're here."

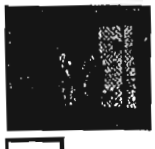
Related Site:
Joint Task Force Guantanamo

A Koran hangs in a surgical mask in Camp 1. The Muslim holy book is hung up on the wall to give it a place of reverence. Photo by Kathleen T. Rhem

High resolution photo



Two detainees in white "uniforms" stand in the doorway of their bay in Camp 4. To a certain extent, a detainee's level is determined by where he is housed, as well. Most Level 1 detainees are afforded extra privileges in Camp 4. Photo by Kathleen T. Rhem



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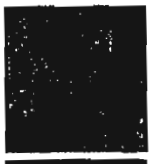
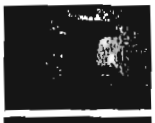
Detainees walk in an exercise yard in Camp 4, where they live in 10-man bays with



nearly all-day access to the yard and other recreational privileges. Photo by Kathleen T. Rhem

High resolution photo



High resolution photo

This view shows an unoccupied wing in the state-of-the-art Camp 5, a $16 million facility completed in May 2004. Photo by Kathleen T. Rhem

High resolution photo

News Archive

http://www.defenselink.mil/news/Feb2005/n02162005_2005021604.html

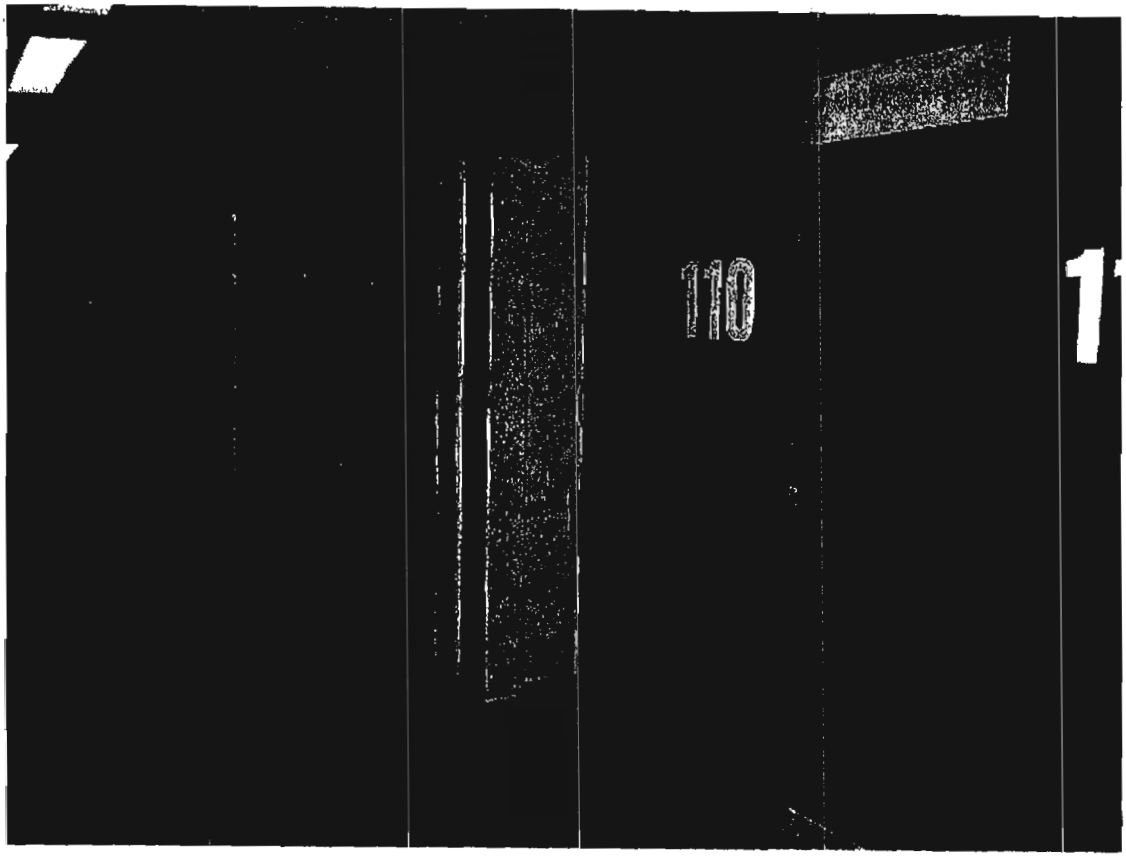

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Exhibit C

DECLARATION OF ERIC W. TRUPIN, Ph.D.

I Eric W. Trupin hereby declare that to the best of my knowledge the following is true and correct:

1. I have personal knowledge of the matters stated herein and, if called upon to testify, could competently testify thereto.

2. My qualifications to render expert psychological opinions include my education and training and over thirty years of clinical, research, and programmatic experience as a child and adolescent psychologist, as set forth in detail in my *curriculum vitae*, which is attached hereto as Exhibit 1.

3. I received my Ph.D. in clinical and community psychology from the University of Washington in 1974. My postgraduate training has included an internship in clinical psychology at the University of Washington, Department of Psychiatry and Behavioral Sciences from 1973 to 1974.

4. I am currently Professor and Vice Chairman in the Department of Psychiatry and Behavioral Sciences at the University of Washington School of Medicine. I direct the Division of Public Behavioral Health and Justice Policy. For twelve years, from 1987 to 2000, I was the Director of Child and Adolescent Psychiatry of the Children's Hospital and Regional Medical Center in Seattle. I conduct research and publish on a wide range of issues related to juvenile and adult offenders.

5. I also currently direct the mental health clinics in both county and state juvenile facilities in Washington State under contract with the University of Washington

6. I also serve as an expert /consultant to the U.S. Department of Justice's Civil Rights Division's Special Litigation Section. I have and continue to be involved in the Department of Justice's investigations of conditions of confinement under the Civil Rights of Institutionalized Persons Act (CRIPA) in a number of states and counties. The subject of detainee isolation, seclusion and solitary confinement is often a focus of these investigations. In addition, I serve as the mental health monitor on a number of settlement and consent decrees.

7. Over the course of my career I have evaluated the mental health of hundreds of youth detained in correctional facilities.

8. I have been retained by O.K.'s counsel, the International Human Rights Clinic at American University Washington College of Law, to conduct an evaluation of O.K.'s current mental status. The assessment provided in this Declaration is based on representations made to me by one of O.K.'s attorneys, Muneer Ahmad.

9. According to Professor Ahmad, O.K. is an adolescent of 17 years of age who has been detained at the U.S. Naval base at Guantánamo Bay, Cuba, since the age of 15. It is

believed that he has been held in solitary confinement since his capture and incarceration two and a half years ago. O.K. has not been permitted contact with his family, with other children his age, or with his attorneys.

10. It is believed that O. K. was shot three times at the age of 15, while still in Afghanistan, and that he is in poor physical health.

11. I understand that approximately 31 suicide attempts have been made by detainees at Guantánamo Bay.

12. Both my clinical experience and the research literature reflect the profound deleterious effects of extended isolation and solitary confinement on an individual's psychological functioning and overall health status (Bauer,M., Priebe ,S., et al,1993; Grassian, S., 1983; Haney,C. 2003; Jemelka,R., Trupin,E.,Chiles,J., 1989; Mitchell, J., Varley, C., 1990). Suicide attempts, self mutilation, auditory and visual hallucinations, paranoid delusions leading to violent aggressive behavior, memory and attentional problems, other cognitive dysfunctions and a wide range of physical problems stemming from eating and sleeping problems have been consistently identified in individuals subjected to relatively brief isolations (less than a week).

13. Standards of care and practice policies have been established to address the management of youth maintained in isolation and solitary confinement by the Office of Juvenile Justice and Delinquency Prevention, The National Council on Correctional Healthcare and the American Psychiatric Association. In the standards established by these entities, long term solitary confinement is not supported. When brief isolation or solitary confinement is deemed necessary for the security or safety of the youth or others due to specific manifestations of self harming or aggressive behaviors, delineated procedures related to mental health care are specified. These include regular assessment and evaluation from a qualified mental health professional and the initiation of treatment when deemed necessary by the mental health professional. The standards also require that correctional staff identify the specific behaviors a youth needs to display in order to be released from confinement and for how long they need to sustain this behavior.

14. The effects of persistent withholding of sensory, cognitive and emotional contact and stimulation can have a limiting and deviant effect on both behavior and neuropsychological development with adolescents. The capacity to be resilient to the effects of isolation is compromised by their inability to utilize the cognitive and emotional strategies that develop as a function of maturity. Without social contact or regular communication with family or adults who display concern for one's circumstances (even though they may be horrified by the adolescent's crime), adolescents display increasing manifestations of psychopathology.

15. In addition, the inability of the adolescent to display any behavior which could influence a change in the circumstances of their confinement often contributes to the exacerbation of symptoms such as self mutilation, depression and or aggressiveness. For these youth, the lack of any control over the circumstances of their confinement in

combination with the absence of social contact contributes to the persistence and exacerbation of psychiatric symptoms.

16. The conditions of [redacted]'s confinement may cause mental deterioration so severe as to impair [redacted]'s ability to understand the legal consequences of the charges made against him and to assist his attorneys in his defense. Moreover, these conditions make particularly susceptible to mental coercion and false confession.

17. The impact on an adolescent such as [redacted] who has been isolated for over two and a half years is potentially catastrophic to his future development. Long term consequences of extended confinement are both more pronounced for adolescents and more difficult to remediate or treat even after solitary confinement is discontinued. It is my opinion, to a reasonable scientific certainty, that [redacted]'s current conditions of confinement place him at significant risk for future psychiatric deterioration, which may include irreversible psychiatric symptoms and disorders.

18. In order to effectively address [redacted]'s mental status, his competency to understand the legal implications of the charges being brought and the impact of the conditions of confinement on his overall functioning, it will be necessary to conduct a comprehensive in person interview, assessment and record review estimated to take a minimum of three days.

19. I am qualified to perform such an evaluation on [redacted] and am willing and available to travel to Guantánamo Bay in order to do so.

20. In light of reports that [redacted] may suffer from ongoing physical injuries, it is advisable that a physician specializing in internal medicine evaluate [redacted], as well.

21. The opinions rendered in this Declaration were reached without conducting a personal examination of [redacted] due to government restrictions preventing access to him.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of August, 2004.

Eric W. Trupin Ph D

Eric W. Trupin, Ph.D.

Exhibit D

Merriam, John J CPT OMC

From: [redacted]D MAJ USSOUTHCOM JTFGTMO
Sent: Thursday, April 06, 2006 9:39 AM
To: Vokey, Colby C LtCol USSOUTHCOM JTFGTMO; Merriam, John J CPT OMC; Ahmad, Muneer I CIV OMC
Cc: [redacted]
Subject: RE: Supplemental Discovery Request: Conditions of Confinement

Gentlemen,

I should have an affidavit from the Commander of the Joint Detention Operations Group later this morning. Your request below to speak to the PAO officer is not relevant, as the affidavit is providing the requested information directly from the decision maker.

I have asked the JTF to copy Colonel Davis and [redacted] from our office to provide you with the affidavit when we receive it. If you believe the Joint Detentions Operations Group policy will limit the accused from receiving a full and fair trial, I recommend filing a motion seeking appropriate relief.

V/R,

Major [redacted]

-----Original Message-----
From: Merriam, John J CPT OMC
Sent: Wednesday, April 05, 2006 10:21 PM
To: [redacted]
Cc: Vokey, Colby C LtCol USSOUTHCOM JTFGTMO; Ahmad, Muneer I CIV OMC; [redacted]
Subject: Supplemental Discovery Request: Conditions of Confinement

Sir:

This is a request for discovery and for the production of at least one witness in relation to the issue regarding detainee Omar Khadr's conditions of confinement.

The defense proffers the following facts with respect to this request:
1. On 4 April 2006, after learning that detainee Omar Khadr had been moved from Camp 4 (where he has been held the entire time he has been represented by detailed military counsel) to Camp 5 (where he resides in segregation, in substantially higher security conditions), detailed military counsel contacted the Staff Judge Advocate's Office for JTF GTMO to get information regarding the reasons for the move and the conditions of confinement.
2. This was particularly important information to the defense as the move appears, on its face, to be linked in some way to the status of detainees with respect to military commissions. Specifically, Khadr, as well as several other detainees currently facing commissions trials (Barhoumi, Zahir, Hamdan, etc.) were moved, despite not having committed or been alleged to have committed any offense against camp discipline or to have in any way acted in such a manner that he could reasonably be believed to pose a threat to others. Meanwhile, detainees like Al Bahlul (who has "boycotted" the proceeedings) were NOT moved.
3. On 5 April, the defense again contacted JTF GTMO SJA and this time were told that JTF GTMO SJA could not provide any information and would not do so. JTF GTMO SJA referred the defense to the Task Force, but refused to provide a contact name or number.
4. On 5 April, at the conclusion of hearings in the commission for that day, a news article was published in which a JTF GTMO spokesman had already released an explanation to the press regarding the changed circumstances of Khadr's confinement. This was done by the same entity, JTF GTMO, that apparently could not give this information to the defense.

Accordingly, the defense requests the prosecution to make available Cdr. Robert Durand, the JTF GTMO representative who spoke to the press, for the purpose of interview as a potential witness in the case. The defense also requests that the prosecution make available the JTF operations officer or responsible official who makes decisions regarding the transfer of detainees from one camp to another. The defense believes this officer is in the grade of COL/O-6, based on information relayed to the defense by detainees. The defense requires production of the witness in order to determine whether Omar Khadr's conditions of confinement have been altered with a view towards punishing him for his participation in the case. More importantly, the defense has good reason to believe that this move was done with a view towards interference with the defense counsels' ability to form and maintain an attorney-client relationship with the accused. The prosecution is reminded that interference by government agents with the

representation of a criminal defendant is universally deplored, and directly implicates both the 5th and 6th amendments to the Constitution of the United States.

An earlier email filed as a discovery request indicated that a "formal document" would ensue. That is not the case -- that email, together with this one, constitute valid discovery requests by the defense.
v/r,

CPT John Merriam

Exhibit E

AMERICAN FORCES INFORMATION SERVICE
NEWS ARTICLES

Case of Suspected Teen Terrorist Hits More Legal Roadblocks

By Sgt. Sara Wood, USA
American Forces Press Service

NAVAL STATION GUANTANAMO BAY, Cuba, April 6, 2006 – The military commissions case of suspected terrorist Omar Khadr, which has already dealt with questions about pre-trial publicity, was confronted with more legal issues yesterday, with the defense team facing an ethical dilemma and then going on to challenge the presiding officer's fitness to serve.

The defense's ethical dilemma came after Canadian-born Khadr, 19, told the court he was boycotting the proceedings because he was not being treated fairly, even though he was cooperating in the commissions. Khadr's defense counsel, Marine Lt. Col. Colby Vokey, said the boycott came because Khadr had been moved to solitary confinement March 30, which made it difficult to prepare his defense. After a heated exchange with Marine Col. Robert S. Chester, the presiding officer, and a brief recess, the defense requested that the confinement issue be dealt with right away.

Chester denied the defense's request, and Vokey and Muneer Ahmad, Khadr's civilian defense counsel, said they could not continue with proceedings because it was against their client's wishes. Ahmad said that Khadr had made clear to them that he wanted the confinement issue resolved before any other proceedings took place. To continue would be a conflict with their client's, and therefore would be an ethical violation for the attorneys, Ahmad said.

Chester said the court could not immediately decide the issue of Khadr's confinement status, because the prosecution had not had any time to do research and find possible witnesses. Because there was no legal authority that proved continuing would be an ethical violation, he ordered proceedings to move forward. The defense team cooperated with further proceedings, but under protest.

In a statement issued after the morning's proceedings, a Joint Task Force Guantanamo spokesman said no one at Guantanamo Bay is ever in solitary confinement.

"Consistent with Army regulations, individuals in a pre-trial status are separated from the general population," said Navy Cmdr. Robert Durand, director of public affairs for JTF Guantanamo. "These measures are largely for the protection of the detainee."

Most of the detainees charged by the Office of Military Commissions are housed in Camp 5, which is a state-of-the-art facility completed in May 2004 where detainees can communicate with one another and use a recreation yard, Durand said.

In later proceedings today, during voir dire -- the process by which the legal counsel determines if a judge can be fair and impartial -- the defense raised two issues that caused them to challenge the suitability of the presiding officer and ask him to step down from the case.

The first issue raised was Chester's extensive attention to material in the media and other outside

sources about this case. This issue was dismissed quickly by the prosecution and by Chester, because his stated reason for looking at the material was to ensure nothing in the public domain would affect the fairness of the hearing.

"These commissions are important; that there be a full and fair trial is important; that Mr. Khadr's rights are protected is important," Chester said in response to questions about his reasons for paying attention to the media.

The other issue raised was the fact that Chester, who has extended his service past retirement to serve in the commissions, currently has a job application in to become an immigration judge for the U.S. government. The U.S. attorney general makes selections for immigration judges, and the attorney general has a personal interest in the outcome of the military commissions, Vokey said, so that puts Chester in a compromising position.

"You are asking for a job from someone who has a vested interest in how you decide this case," Vokey said.

The prosecution countered that the attorney general does not have any authority in military commissions, and therefore is not affected by the outcome. Chester agreed, saying that his decision will not be influenced by his application.

Chester denied the defense's request that he remove himself from the case, and said further details as to why he made this decision will be provided at a later date.

Khadr is charged with attempted murder based on the allegation that he emplaced improvised explosive devices on routes frequented by U.S. military convoys. He also is charged in connection with a grenade attack that killed Army Sgt. 1st Class Christopher Speer and two Afghan military members in Afghanistan on July 27, 2002.

Related Sites:
Military Commissions
Detainee Affairs

Related Article:
Added Guantanamo Hearing Deals With Pre-trial Publicity

News Archive

http://www.defenselink.mil/news/Apr2006/20060406_4726.html

World

This photo of Omar Khadr was taken before he was imprisoned and distributed by his mother, Maha Khadr.

Khadr lawyer asks judge to halt proceedings

Updated Wed. Apr. 5 2006 10:02 PM ET

Associated Press, Canadian Press

GUANTANAMO BAY NAVAL BASE, Cuba — A defence attorney for a Canadian teenager accused of killing a U.S. soldier in Afghanistan asked the judge on Wednesday to halt proceedings because of a lack of established rules for the military trials.

"Sir, you should halt these proceedings ... until the government gets the rules together," said Army Capt. John Merriam, an attorney for Omar Khadr, 19.

Shouting and table banging punctuated Wednesday's hearing at this isolated U.S. military base as the judge, Marine Col. Robert S. Chester, and another of Khadr's defence attorneys clashed over the lack of rules for the first military tribunals since the World War II era.

Chester said he would rule on Merriam's request to halt proceedings after he has read relevant material delivered by the defence.

Early in the session, Khadr said he was boycotting the proceedings because he has been kept in solitary confinement since March 30. Chester berated the defence attorney, Marine Lt. Col. Colby Vokey, for not having warned him earlier of the situation.

As the voices grew louder, Vokey banged his hand on a varnished wood table and shouted that he hadn't had an opportunity to alert the judge.

"Every time we come down here there is an incredible burden just to do my job," Vokey shouted. Chester then called a recess.

Late Wednesday, Navy Cmdr. Robert Durand issued a statement saying no detainees at Guantanamo Bay are put in solitary

confinement but adding that detainees "in a pre-trial status are separated" from the general population. Khadr was moved to a cell alone in a higher-security area for his own protection but still can see and talk to other inmates on his tier, Durand told The Associated Press.

Vokey and the judge also clashed about trial procedures to bring in a Canadian consulting attorney requested by the Toronto-born Khadr, who was 15 when he was captured.

Chester asked Vokey if he had filed a brief requesting a Canadian attorney as a consultant. Only lawyers who are U.S. citizens are permitted to directly participate. The judge then told Vokey that even if a brief was filed, he didn't know if he had the authority to allow a Canadian attorney into the courtroom.

"There are no rules here," Vokey retorted. "It seems kind of crazy, if the presiding officer doesn't have the authority to act on it, to go to the presiding officer."

In a separate hearing Tuesday, Chester refused to say if he would use international law, or military law or federal statutes as guidelines. The chief military prosecutor, Air Force Col. Morris Davis, later said the judge can use several standards of law "to provide a full and fair trial."

Khadr has been charged with murder, attempted murder, aiding the enemy and conspiracy for allegedly throwing a grenade that killed a U.S. Special Forces soldier while fighting with the Taliban in Afghanistan and for planting mines targeted at American convoys.

Chester said the issue of Khadr's solitary confinement would be addressed later in the week.

"We cannot stop these proceedings every time the accused doesn't like what he had for breakfast or doesn't like his confinement," said a military prosecutor, who cannot be identified under military ground rules to journalists.

Khadr, who has a sparse beard and was dressed in a blue checked shirt, khaki pants and Reebok sneakers, remained in the courtroom as the pretrial hearing continued.

Khadr is accused of killing Army Sgt. 1st Class Christopher Speer, 28, of Albuquerque, N.M., and wounding Army Sgt. Layne Morris, of West Jordan, Utah in the August 2002 firefight.

The wounded soldier and Speer's widow filed a civil lawsuit against Khadr and his father, a suspected al Qaeda financier who authorities believe was killed in Pakistan. In February, a judge awarded them $102.6 million in their suit, though they have been unable to collect the judgment and the family's assets are unknown.

Nearly 500 detainees are held at this U.S. military base in southeastern Cuba. The U.S. has filed charges against 10 of them.

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Exhibit F

AFFIDAVIT

I, Colonel Michael I. Bumgarner, United States Army, under the penalties of perjury, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

I am a Colonel in the United States Army with over twenty four (24) years of active duty service as a Military Policeman . I am currently assigned as the Commander, Joint Detention Group, for the Joint Task Force Guantanamo, Guantanamo Bay, Cuba. As Detention Group Commander, I am responsible for all aspects of detention operations associated with the care and custody of Enemy Combatants from the Global War on Terror that are being held at U.S. Naval Station, Guantanamo Bay, Cuba. I have served in this position since April 2005. I answer directly to the Joint Task Force Commander, RDML Harris, or the Deputy Commander, BG Leacock.

It is my responsibility, among others, to see that the detention mission is performed in a humane manner that protects the safety and security of the detainees, and the safety of security personnel at JTF-Guantanamo. I am completely familiar with all of the detention areas within the Joint Task Force, including the actual structure and conditions within each area, and the policies and procedures for detention operations in each of those areas.

As of approximately 30 March 2006, eight of ten Enemy Combatants charged with war crimes and scheduled to appear before a military commission have been co-located together on a tier of one of the newest detention camps, known as Camp 5. The other two charged detainees are housed in a different facility. It is my intention to move the remaining charged commissions defendants to this same location when operationally feasible.

Prior to co-locating the charged detainees on the same tier of Camp 5, they were spread out across the camps, living in a number of different facilities. For example, three were living in Camp 4 (including Detainee Khadr), three were living in Camp 3, one in Camp 5. The living conditions of the various charged detainees varied, depending on which camp they were in.

Camp 5 is an American Corrections Association certified maximum-security detention facility. It was designed after a federal maximum-security facility in Indiana. The charged commissions detainees are held in one tier within the same wing of the Camp 5 facility. On this tier, there are 12 cells, of which eight are occupied by the charged detainees.

I am familiar with the American Corrections Associations standards and, with respect to the conditions of the detention, neither Detainee Khadr nor the other commissions detainees are segregated, held in isolation, or in solitary confinement. The charged detainees are held in individual concrete cells. The cells are not audio isolated and there is no effort made to disrupt any communication between the detainees from within their cells. They are allowed to participate in daily prayers, which occurs five times each day, and one of the detainees leads those prayers. The tier in which they are housed also has a reading room for the detainees' use on a scheduled periodic basis.

Each detainee is allowed two hours of recreation a day. The recreation fields are divided into eight sections, separated by a link fence. They are able to communicate with each other, but cannot physically touch each other or play games, such as soccer. Six of the detainees participate in recreation at the same time. Two detainees participate in recreation activities in the newer recreation yard. Each recreation yard has physical exercise equipment, such as an eliptical machines for cardio-vascular exercise.

By comparison, Camp 4 is a medium-security, communal living facility in which detainees reside in open bays, with ten detainees per bay. They are able to recreate in groups, including having the opportunity to play games such as soccer, basketball or even chess.

I supported and approved the decision to co-locate the charged detainees within the same tier of Camp 5. I then recommended the movement to the then-Joint Task Force Commander, MG Hood. He approved the decision and the relocation was made. This decision was well-advised and carefully thought out. Input from senior leaders within the Joint Detention Group was obtained in consideration of this decision. It was not arbitrary. The movement was not and does not punish the charged detainees. Furthermore, it was not done to affect the commissions process, and it in fact does not.

There were two primary reasons why the charged individuals were moved to the same wing of Camp 5. First, JTFGTMO is consolidating detainee operations due to a variety of factors, including a reduction in personnel and the anticipation of opening the new detention facility, known as Camp 6, sometime later this year. Some camps are being shut down and others are being moved around. Moving the charged detainees to the same wing in Camp 5 helps manpower issues and makes for smoother camp operations.

Second, Joint Task Force Guanatanamo is trying to comply with AR 190-47 and AR 190-8, and sound correctional doctrine which recommend separating various classes of detainees, such as keeping pre-trial detainees separate from others and keeping detainees separated based upon the seriousness of the charged offenses. While it can be said that all of the detainees are pre-trial, the fact that ten individuals have been charged changes the operational security for their care and custody. Consistent with AR 190-47 and AR 190-8 separating the group from the uncharged individuals increases the safety and security of the facilities for all detainees and allows more efficient operation of the guard force.

Richard V. Bumgarner

MICHAEL I. BUMGARNER
Colonel, United States Army
Commander, Joint Detention Group
Joint Task Force Guantanamo

Executed on: 06 April 2006

Exhibit G

PROFFER OF OMAR KHADR

I, Richard J. Wilson, hereby offer the following proffer. If called to testify regarding his transfer from Camp 4 to Camp 5, Omar Khadr would testify substantially as follows:

1. On March 30, 2006, he was a resident of Camp 4, the lowest security facility within the Camp Delta compound. As such, he lived in a dorm-style building with 10 occupants sleeping on cots in a large open room. He had all comfort items allocated to detainees in that camp, including white clothing, bedding, access to books through a library and other personal effects. He had access to the outdoors for several hours a day, and was permitted to eat, sleep, and pray with other detainees. He had been at Camp 4 for a continuous, uninterrupted period of approximately six months. As such, he was in Camp 4 when he was first charged and referred to a military commission in November 2005, and remained in Camp 4 during the time before and after the first session of his military commission in January 2006.

2. At approximately 10 p.m. on March 30, 2006, he was notified that an order from "the Colonel" had been issued for his transfer to Camp 5, what he understands from his own experience and from what he has been told by others is the camp with the harshest conditions at Guantanamo.

3. He did not engage in any misconduct prior to his transfer from Camp 4 to Camp 5.

4. Prior to September of 2005, he spent approximately 15 months in Camp 5, immediately previous to his transfer to Camp 4.

5. At Camp 5 detainees are housed in individual cells, totally isolated and segregated from other detainees. The cell is cement on all four walls, with an opaque window slit through which light from outside enters, as well as a small, mirrored window in the door that permits guards to view him without him seeing out. The door is sealed steel, which prevents him from seeing any other detainees, and permits only limited communication under the small gap between the door and the concrete floor. Comfort items can be taken at will by guards, and cell searches are random and frequent. Exercise is extremely limited, and generally is no more than one hour per day.

6. On the date of his transfer, he was transported to Camp 5 in the same van with Salim Hamdan, another detainee with a military commission proceeding. After arriving at Camp 5, he became aware that there are seven other detainees with military commission proceedings. The detainee in the cell next to him is Abdul Zahir.

7. He believes that there are two detainees with military commission charges who were not transferred to Camp 5. They Ali Hamza Ahmed Suleiman Al Bahlul and Ghassan Abdullah Al Sharbi. Both of these individuals have refused to cooperate with their detailed defense counsel and/or civilian defense counsel in the military commission process, and yet they were not transferred.

8. He suffers from chronic joint pain which has been exacerbated by the cold temperatures maintained in Camp 5. He also has had difficulty breathing because of the cold temperatures.

9. During his prior detention in Camp 5, he experienced delusions and hallucinations and other symptoms of mental disorder. When at Camp 5 for prolonged periods, he has difficulty concentrating or thinking straight.

10. Because of the transfer to Camp 5 of all commission detainees except the two who are not cooperating, he believes that he is being punished for cooperating in the military commission process.

Respectfully Submitted,

Richard J. Wilson

Exhibit H

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS
COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS
COMMISSION INTERAMÉRICAINE DES DROITS DE L'HOMME

ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

March 21, 2006

Ref: **Omar Ahmed Khadr**
Precautionary Measures N° 8-06
United States

Dear Professor Wilson:

On behalf of the Inter-American Commission on Human Rights, I write with regard to the above-cited request for precautionary measures relating to Mr. Omar Ahmed Khadr (hereinafter "O.K.").

I wish to inform you that during its 124th Regular Period of Sessions, the Commission considered your request for precautionary measures and , in a note of today's date, decided to address the Government of the United States in the following terms:

> As Your Excellency is aware, on March 13, 2006 during its 124th Regular Period of Sessions, the Commission convened a hearing in this matter in order to receive representations from O.K.'s representatives and the State as to whether the request for precautionary measures should be granted. After considering the written and oral submissions of the parties, the Commission has concluded that a serious and urgent risk of irreparable harm can be said to exist with respect to one aspect of the request for precautionary measures, namely the circumstances of O.K.'s conditions and treatment in detention.
>
> More particularly, the information presented by the Petitioners indicates that O.K. has been the victim of serious instances of mistreatment at the hands of interrogators and military personnel during his time in detention in Afghanistan and at Guantanamo Bay. It is alleged in this connection that O.K. was denied pain medication for injuries suffered during his capture, forced to remain in stress positions with both his hands and feet shackled for extended periods, physically assaulted during

Professor Richard Wilson
Washington College of Law
American University
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016

Fax: (202) 274-0659

interrogations, placed in a room with barking dogs with a plastic bag over his head, and threatened with rape.[1] O.K.'s representatives also allege that statements made by O.K. while he was subjected to torture or other cruel, inhuman or degrading treatment or punishment may be admissible and used against him in his criminal proceedings before the military commission.[2]

In its written and oral representations, the United States objected to the Commission's jurisdiction on the basis that the Commission lacks competence to issue precautionary measures in respect of states that have not ratified the American Convention on Human Rights or over matters arising under the laws of war, and that O.K.'s request is inadmissible for failure to exhaust domestic remedies.[3] Concerning the substance of the request, the State has not provided information with respect to the specific allegations raised by O.K. Rather, the State's oral and written observations indicate in general terms that the policy of the United States absolutely prohibits torture and requires all detainees to be treated humanely.[4] Similarly, in response to questions raised by the Commission during the hearing concerning whether the State has taken any measures to investigate O.K.'s allegations of abuse, the State's representative indicated that it was the policy of the United States to investigate all credible allegations of torture but otherwise declined to provide further information, citing privacy concerns. Further, the State failed to clarify whether statements that might have been obtained through torture or other cruel, inhuman or degrading treatment or punishment could be admissible or otherwise used against O.K. in his military commission proceeding, but rather referred the Commission to a military commission rule whereby the presiding officer may admit any evidence that "would have probative value to a reasonable person."

In considering O.K.'s request, the Commission has taken into account its findings in precautionary measures N° 259-02, which were adopted in March 2002 and subsequently maintained and extended in favor of all detainees at Guantanamo Bay. In those measures, as Your Excellency is aware, the Commission emphasized the clear and absolute prohibition of treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.[5] The Commission also noted that according to longstanding inter-American jurisprudence, states must use the means at their disposal to prevent human rights violations and to provide effective remedies for any violations that do occur, including undertaking thorough and effective investigations capable of identifying and punishing persons responsible for human rights infringements.[6] In addition, the Commission stressed that measures to respect the right to humane treatment must include the prohibition against the use in any legal proceeding of statements obtained through torture or other cruel, inhuman or degrading punishment

[1] Request for Precautionary measures dated January 17, 2006, pp. 3-7.

[2] Request for Precautionary measures dated January 17, 2006, pp. 26-27.

[3] Initial Response of the State dated March 13, 2006, pp. 1-2.

[4] Initial Response of the State dated March 13, 2006, p. 3.

[5] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated July 29, 2004, pp. 2-3, citing IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22 October 2002), p. 248.

[6] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 11, citing I/A Court H.R., Velásquez Rodríguez Case, Judgment of 29 July 1988, Series C N° 4, paras. 172-174.

or treatment, except against a person accused of such conduct as evidence that the statement was made.[7]

The Commission has also taken into account its decision in precautionary measure N° 259-02 to reject the jurisdictional objections raised by the State, which were identical to those raised in the present request, whereby the Commission concluded that it has the authority to adopt precautionary measures in respect of non-states parties to the American Convention and to consider and apply international humanitarian law, and that an allegation of non-exhaustion of domestic remedies does not *per se* deprive the Commission of jurisdiction to adopt or maintain precautionary measures.[8]

In light of the above considerations and based upon the information available, the Commission hereby requests that the State take the urgent measures necessary to:

(1) ensure that O.K. is not subjected to torture or other cruel, inhuman or degrading punishment or treatment and is guaranteed his right to respect for his physical, mental and moral integrity. This should include measures to ensure that O.K. is not subjected to prolonged incommunicado detention or forms of interrogation that fail to comply with international standards of humane treatment.

(2) ensure respect for the prohibition against the use in any legal proceeding of statements obtained through torture or other cruel, inhuman or degrading punishment or treatment, except against a person accused of such conduct that the statement was made.

(3) conduct thorough and impartial investigations into O.K.'s allegations of torture and other ill treatment and to prosecute individuals who may be responsible for such conduct, including those who may be implicated through the doctrine of superior responsibility, in light of the State's obligation to ensure that detainees are not subjected to treatment that may amount to torture or may otherwise be cruel, inhuman or degrading as defined under applicable international norms.

The Commission also requested that the United States provide it with information concerning compliance with these precautionary measures within 15 days from the date of transmission of this correspondence.

---

[7] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 11, citing UN Convention Against Torture, Article 15 (providing that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"). See similarly International Covenant on Civil and Political Rights, Art. 14(3)(g); American Convention on Human Rights, Art. 8(2)(g), (3); Inter-American Convention to Prevent and Punish Torture, Art. 10.

[8] Precautionary measures N° 259-02 (Detainees at Guantanamo Bay), Commission's letter to the United States dated October 28, 2005, p. 8.

With respect to the remaining allegations in O.K.'s request concerning the conduct of his military commission proceedings, the Commission considers that these matters would be more appropriately addressed through its petition procedure, based upon the complexity of the issues raised and the possibility that an adoption of precautionary measures would determine the merits of those issues.

Sincerely yours,

Ariel Dulitzky
Assistant Executive Secretary

Hodges, Keith H CIV USSOUTHCOM JTFGTMO

From: [redacted]USSOUTHCOM JTFGTMO
Sent: Thursday, April 06, 2006 4:40 PM
To: Chester, Robert Col USSOUTHCOM JTFGTMO; Ahmad, Muneer I CIV OMC; Merriam, John J CPT OMC; [redacted]Hodges, Keith H CIV USSOUTHCOM JTFGTMO; Vokey, Colby C LtCol USSOUTHCOM JTFGTMO
Cc: [redacted]
Subject: RE: Defense Request for Production of Witnesses for 07 April 2006 Hearing

Sir,

(1) Colonel Bumgarner is currently meeting with Defense Counsel to answer any relevant questions they have regarding the accused's movement. He is available to be a witness tomorrow if the Defense requests. Absent a proffer from the Defense detailing how his testimony will be different from the attached affidavit, I believe his testimony would be cumulative and not necessary to decide this issue.

(2) The Prosecution respectfully declines to produce Commander Durand. The Defense justification below is insufficient to demonstrate how his testimony is relevant to this motion. Colonel Bumgarner is available to testify to the specific reasons the accused was moved.

(3) The Prosecution respectfully declines to produce Sufyian Barhoumi denied. The Defense justification below is insufficient to demonstrate why his testimony is relevant to this motion.

Khadr-Bumgarner Affidavit (2 p...

V/R,

Major [redacted]

-----Original Message-----
From: Chester, Robert Col USSOUTHCOM JTFGTMO
Sent: Thursday, April 06, 2006 3:53 PM
To: Ahmad, Muneer I CIV OMC; Merriam, John J CPT OMC; [redacted]Hodges, Keith H CIV USSOUTHCOM JTFGTMO; Vokey, Colby C LtCol USSOUTHCOM JTFGTMO[redacted]USSOUTHCOM JTFGTMO
Cc: 'mahmad@wcl.american.edu'
Subject: RE: Defense Request for Production of Witnesses for 07 April 2006 Hearing

Mr. Ahmad;

Thank you for the notice.

Maj [redacted]

What is the Gov't position on the witnesses and the availability?

V/R
Chester

-----Original Message-----
From: Ahmad, Muneer I CIV OMC
Sent: Thursday, April 06, 2006 3:07 PM
To: Chester, Robert Col USSOUTHCOM JTFGTMO; Merriam, John J CPT OMC; [redacted]Hodges, Keith H CIV USSOUTHCOM JTFGTMO; Vokey, Colby C LtCol USSOUTHCOM JTFGTMO; [redacted]
Cc: [redacted]
Subject: Defense Request for Production of Witnesses for 07 April 2006 Hearing

A defense motion regarding the transfer of Omar Khadr to Camp 5 is forthcoming. This request is made

separately in order to provide the presiding officer with as much notice as possible to ensure the appearance of witnesses required by the defense. Specifically, the defense requests that the presiding officer order the production of the following witnesses for the commission hearing scheduled for 07 April 2006:

1) Col. Michael I. Bumgarner, Commander, Joint Detention Group, Joint Task Force Guantanamo

2) Cmdr. Robert Durand, Director of Public Affairs, Joint Task Force Guantanamo

3) Sufiyan Barhoumi, Detainee, Guantanamo Bay

In support of this request, the defense states the following:

1. At approximately 9:40 a.m. on 06 April 2006, the prosecution notified the defense by email that an affidavit from the commander of the Joint Detention Group would be provided to us "later this morning." That affidavit, from Col. Bumgarner, was provided to the defense at approximately 1:40 p.m. It includes various assertions regarding the purported reasons for moving Mr. Khadr from Camp 4 to Camp 5. The defense believes it is necessary to examine Col. Bumgarner for the purposes of testing these assertions.

2. Press coverage of Mr. Khadr's 05 April 2006 commission session, including articles posted on the defenselink website, in the New York Times, the Miami Herald, and Canadian media, include quotes from Cmdr. Durand regarding the purported reasons for moving Mr. Khadr to Camp 5. Those quotes differ from the affidavit provided by Col. Bumgarner. In addition, it appears that Cmdr. Durand's statements were made while the defense and prosecution were in commission session on the evening of 05 April 2006. The defense believes it is necessary to examine Cmdr. Durand for the purposes of testing his assertions to the press.

3. Sufiyan Barhoumi is a detainee at Guantanamo Bay who is also in military commission proceedings. Like Mr. Khadr, he was moved from Camp 4 to Camp 5. He will be able to testify to the conditions in Camp 5, the time and circumstances of his move to Camp 5, and his understanding of the reasons for this move. Mr. Barhoumi's detailed defense counsel has represented to the defense Mr. Barhoumi's willingness to testify at the 07 April 2006 hearing in Mr. Khadr's case.

Respectfully submitted,

Muneer Ahmad

AFFIDAVIT

I, Colonel Michael I. Bumgarner, United States Army, under the penalties of perjury, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

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There were two primary reasons why the charged individuals were moved to the same wing of Camp 5. First, JTFGTMO is consolidating detainee operations due to a variety of factors, including a reduction in personnel and the anticipation of opening the new detention facility, known as Camp 6, sometime later this year. Some camps are being shut down and others are being moved around. Moving the charged detainees to the same wing in Camp 5 helps manpower issues and makes for smoother camp operations.

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Richard V. Bumgarner

MICHAEL I. BUMGARNER
Colonel, United States Army
Commander, Joint Detention Group
Joint Task Force Guantanamo

Executed on: 06 April 2006

PO 1 N
US v Khadr
Trial Schedule, Apr 7, 06

1. 28 April 2006: Law motions due.

2. 12 May 2006: Responses to law motions due.

3. 19 May 2006: Replies to law motion responses due.

4. 26 June 2006: Law motion hearing begins. Two weeks docketed.

5. 21 July 2006: Evidentiary motions due.

6. 4 Aug 2006: Responses to evidentiary motions due.

7. 11 Aug 2006: Replies to evidentiary motions due.

8. 21 Aug 2006: Evidentiary motion hearing convenes. Two weeks docketed.

9. 18 Sept 2006: Trial on the merits begins.